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RELIGION AND MORALITY IN LAW*

HOW often you have looked at the great seal of the glorious State of California! How many times you have seen it on official documents! Perhaps we can draw some legal lessons from this ensign of the Golden State. Develop the image now, in your mind's eye.

First of all, you behold the figure of a woman; her name is Minerva. She is obviously Greek and reminds us of man's first constitutional government. The Greeks were the first politically free people, the framers of government by law rather than by men.

There is an island near San Salvador where Columbus made his landfall in the New World. It bears the Greek name Eleutheria, which means political liberty. As surely as Christopher Columbus discovered America, so did Greek ideas sail from Europe into the Western World. Our dictionary is saturated with such civic terms as democracy, despot, tyrant, metropolitan—all of which are Hellenic.

Thus Minerva on the State Seal reminds us of law and order. But we must remember that Greek civilization was built upon a divine order, the supreme law of almighty Zeus, Jupiter. The legal system supposed a public morals with judgment and sanctions always present. Therefore, the heroine Antigone in the great drama of Sophocles, challenges the human legislator, who wishes to oppose the divine law:

*Sermon delivered by His Excellency, The Most Reverend Merlin J. Guilfoyle, D.D., J.C.D., Auxiliary Bishop of San Francisco, at the first Red Mass in Sacramento, California, on March 13, 1958.

You, who are mortal cannot change
The infallible, unwritten laws of Heaven.
They did not begin today or yesterday,
But they are everlasting, and none can tell
The hour that saw their birth.
I would not, from fear of any human edict,
Incur the God-inflicted penalty of disobeying divine law.

So in our language we have the word nemesis, which means retributive justice. This is the Greek term for the divine displeasure incurred by trampling on the rights of others. The sanction was the persecution of the Furies, the Eumenedes, a judgment which pursued man even in this life. Every Greek believed that the Erinys brought retributive punishment on anyone guilty of homicide, or who broke an oath or committed perjury.

Though the mills of God grind slowly
Yet they grind exceeding small;
Though with patience He stands waiting,
With exactness grinds He all.

To establish and defend their way of life, the Greeks had to fight decisive battles of the world against overwhelming odds. At the heroic pass of Thermopylae you may read the inscription:

"Go tell the Spartans, you who are passing by,
That here we lie, obedient to her laws."

The word Marathon has also come into our language, a footrace of 26 miles, 385 yards, the distance from the battle of Marathon to Athens. In 490 B.C. an athlete ran this distance twice to shout "Rejoice, we have conquered".

Looking at the Great Seal of California, our eyes pass from Minerva to a semicircle of stars, which number 31. The first 13 attract our attention and recall the founding Fathers of the United States. The Father of our country, following the Greek tradition, understood that citizenship cannot be legislated; it must be taught.

In his celebrated Farewell Address our First President said: "Of all dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity.

"Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in the Courts of Justice?

"And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure—reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles."

The conviction of the Father of Our Country that without a moral conscience laws cannot be enforced, was echoed by all of the Founding Fathers of America.

Alexander Hamilton stated: "Civil liberty is only natural liberty, modified and secured by the sanctions of civil society." And Thomas Jefferson asked: "Can the liberties of the nation be thought secure, when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?"

A gentleman, James Wilson, who signed both the Declaration of Independence and the Constitution wrote: "To direct the more important parts of our conduct, the bountiful Governor of the universe has been graciously pleased to provide us with a law—and to direct the less important parts of it, he has made us capable of providing a law for ourselves."

And so the stars of the Seal of California reflect the brilliancy of the Founding Fathers, who recognized "the laws of

nature and of nature's God" and "the self-evident truths that men are endowed by the Creator with unalienable rights", "that to secure these rights governments are instituted among men."

Thus the whole foundation of our way of life presupposes the spiritual and moral nature of man. These ideas are as fundamental as the solid granite of Mt. Rushmore in South Dakota which bears the images of Washington, Jefferson and Lincoln, the largest sculpture ever made by man.

The American way of life, which has always supposed a divine moral law directing the actions of men, is again expressed in the age of Lincoln, at the very birthday of California.

In one of the finest documents ever to emanate from the White House, Abraham Lincoln answered a request of both houses of Congress that a day of prayer, humiliation and fasting be established to speed the restoration of peace. The President wrote on August 22, 1861:

"It is fit and becoming in all people, at all times, to acknowledge and revere the supreme government of God; to bow in humble submission to His chastisements, to confess and deplore their sins and transgressions, in the full conviction that the fear of the Lord is the beginning of wisdom; and to pray with all fervency and contrition for the pardon of their past offenses; and for a blessing upon their present and prospective action.

". . . It is peculiarly fit for us to recognize the hand of God in this terrible visitation, and in sorrowful remembrance of our own faults and crimes as a nation and as individuals, to humble ourselves before Him and to pray His mercy . . . that the inestimable boon of civil and religious liberty, earned under His guidance and blessings, by the labors and sufferings of our fathers may be restored in all its original excellence."

Our fathers' God, to Thee
Author of liberty,
To Thee we sing,

Long may our land be bright
With freedom's holy light
Protect us by Thy might,
Great God, Our King.

After viewing the first stars in the Seal of California, we turn to the last.

The thirty-first star in our Great Seal represents California, which joined the union during the age of Lincoln. Our beloved State likewise holds to the spiritual nature of her citizens. The Preamble of the State Constitution reads; "We the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution."

It's home again, and home again
America for me.
My heart is turning home again
And there I long to be.
To the blessed land of room enough
Beyond the ocean bars,
Where the air is full of sunlight
And the flag is full of stars.

From the figure of Minerva, the Greek, and the semicircle of the American and California stars, we now turn our attention to the bear on the Great Seal of California. Let us read the story of two bears, after the manner of Aesop, whose very name has spread from Greece throughout the world as the author of Fables about animals. There are two bears in the world today and a bear fears nothing in his world except another bear. One bear is Siberian and the other is the Grizzly.

For the first time in the history of the world, a bear has become the symbol of an atheistic amoral State. The Soviets offer the first system of government ever predicated on a denial of morals and divine law. Most animals walk on their toes; the Siberian Bear sometimes walks upright, looks like a man, but is not.

The California Grizzly Bear is a symbol of free men. Those

who made the first State Flag might have been illiterate for they mispelled the word Republic on the banner, omitting the letter "I". But, they were men who loved freedom and understood the principles of right and wrong.

The death struggle between these two Bears, symbols of human beings as are all animal fables, is taking place all around the world behind the iron curtain, the bamboo curtain, even here in California. The arena is the mind of everyman. We could fire the world's biggest firecracker at the Man in the Moon and still lose life, liberty and the pursuit of happiness. The stadium for the struggle is the school, education, for the atheistic materialistic bear does not care about adults; he devours children.

Knowledge alone, even scientific, cannot make good citizens. Patriotism is a virtue and must be taught. A scientist can be inside another Trojan Horse or be another General Benedict Arnold. Morals are not a mathematical formula; they demand the discipline of the will.

> Blest victory and peace, may the heaven rescued land
> Praise the Power that has made and preserved us a nation!
> Then conquer we must, when our cause it is just,
> And this be our motto, "In God is our trust."

For all these reasons you exemplary, excellent gentlemen gather in prayer today to invoke Divine Guidance. You do well to honor St. Thomas More, as your patron.

Thomas More would have approved the Great Seal of California for several reasons. He was a Greek scholar and could appreciate the symbolism of Minerva, the Greek politics builded upon morals. He would have rejoiced in the stars of our independence, for although Chancellor, servant and friend of the king, he kept his head by losing it. He knew that an admission of spiritual power to the government was the end of all individual freedom and justice. Thomas More would also appreciate the allusion to the Russian Bear and he would smile to know that the Soviets had gathered up the best collection of his own book Utopia. He would know that the

Soviet system by its very nature is dying, albeit slowly, because it attempts Utopia without morals and with a negation of the spiritual nature of man. "Unless the Lord build the house, they labor in vain who build it. Unless the Lord watch the city, they watch in vain who keep it."

The Great Seal of California! *Eureka!* A summary of our legal position! Thanks to Minerva and the clear thinking of the ancient Greeks! Thanks to the stars of our Federated Union and the Star of California! Thanks to the Grizzly Bear and the lessons of the Bear Flag Republic! Here in Blessed Sacramento, we pray before the Blessed Sacrament.

May we of the Golden State, who live so near the Golden Gate, keep looking through that gate toward our eternal home and pray:

> America! America! May God thy gold refine
> Till all success be nobleness
> And every gain divine.
> America! America! God shed His grace on thee,
> And crown thy good with brotherhood
> From sea to shining sea.

CANON LAW AND AMERICAN CHURCH LAW: A COMPARATIVE STUDY

CONFLICTS between individual churches and the law of the United States have a long history in our country. It is only in recent years that polygamy, practiced by the Mormon Church, has been held to conflict with American Law. Such conflicts can take place because both the churches and the state claim the allegiance of the same person. How much conflict is present can be known only from a study of the laws of the state and the particular church. The jurisprudence of church and state must be studied in the light of each other.

Over thirty-four million Americans are members of the Latin Catholic or Oriental Catholic Churches. As Americans they are subject to the law of the United States and of the individual states; as Catholics they are subject to the law of their particular Church. It is the purpose of this study to compare these two systems of laws as they affect American Catholics.

Any attempt to compare every possible area of conflict would require a book of some length; only the general principles of both systems will be discussed in this study. With these as a background, the examination of particular problems will be simplified.

Religious Societies in American Law

Religious societies in the United States do not follow the same pattern of organization or discipline. The American law has recognized this diversity and has developed legal terminology which fits the situation in this country. It is essential to a clear understanding of the status of religious societies in the United States to distinguish between the congregation, the church, and the corporation. The individual churches will fall into three general classes according to their organization.

Congregation, Church, and Corporation

The distinction between the congregation, the church, and the corporation was first set down in clear language in 1837 in the case of Miller vs. Baptist Church,[1] and the distinction has been used until this day. The congregation is a variable group of persons who meet for the general purpose of worshiping God. Among them may be many persons who do not subscribe to all the tenets of the church, and so have never become members of the church. Mere attendance at church services does not make one a member of the church, although a member of the congregation.

The church is an ecclesiastical body made up of those persons who are entitled to full church membership. The members profess the same basic tenets and are subject to the discipline of the church. The rules and regulations of the church bind the members together, and their internal life is governed by these rules and regulations.

In most of the American jurisdictions each church has some kind of civil corporation which performs civil acts in its name. The corporation is set up according to the requirements of the civil law in order to hold property for the church, to sue and be sued, to borrow money, etc. This civil corporation is not the church, but rather is established to perform legal acts for the church.

These distinctions were explained by the Supreme Court of Indiana in the following words:

> Religious societies in this state, whose trustees are incorporated, present a threefold aspect: First, the congregation who usually meet together for the purpose of religious worship; second, the church, strictly so called, an ecclesiastical body, composed of those persons entitled to full church privileges; and third, the legal corporate body, composed of the board of trustees.[2]

[1] Miller vs. Baptist Church, 16 N.J.L. 251 (1837).

[2] Gray vs. Good, 44 Ind. A 476, 89 N.E. 498 (1909).

The individual states legislate the particular form of legal corporation which shall represent the churches. In New York the individual churches have a corporation aggregate which represents them.[3] The same system of incorporation is provided for in the State of Ohio, but the property of parishes and dioceses is usually held by the Ordinary as trustee sole.[4] Some states, such as California and Alabama, permit the creation of a corporation sole for the purpose of securing church property. In only two states, Virginia and West Virginia, does there exist a prohibition against granting a charter of incorporation to a church. Property in these states is secured by trustees.[5] It is important to understand that such corporations or trustees function only in civil matters where there is question of property rights or other legally protected civil rights. They have no ecclesiastical function.

Classification of Churches

Three different classes of churches are recognized in American law; the classification is dependent upon the form of internal government of the individual church. Hierarchial churches are governed by succeeding higher eschelons of superiors such as pastors, bishops, archbishops, the Pope. The Roman Catholic Church falls into this class, and the law governing such churches will constitute the burden of this paper.

If the ruling power in the church resides in succeeding higher eschelons of assemblies or synods, the church is of the presbyterian or synodal form. This form of government is found in the Presbyterian churches, among others, in the United States.

[3] Murphy, *The Laws of the State of New York Affecting Church Property*, The Catholic University of America Canon Law Studies, n. 388 (Washington, D.C.: The Catholic University of America Press, 1957) p. 34.

[4] Wiggins, *Property Laws of the State of Ohio Affecting the Church*, The Catholic University of America Canon Law Studies, n. 367, (Washington, D.C.: The Catholic University of America Press, 1956) p. 72.

[5] Dignan, *A History of the Legal Incorporation of Catholic Church Property in the United States*, (New York: P. J. Kennedy & Sons, 1935) pp. 245-262.

The third class of churches are known as congregational churches. These churches recognize no authority higher than the local church, and are in no way subject to the discipline or rule of any other body.

In the case of Thomas vs. Lewis, the Supreme Court of Kentucky differentiated these three classes of churches in this language:

> Different Christian denominations have different forms of government. . . . One is the prelatial form in which the governing power resides in prelates or diocesan bishops and the higher clergy. . . . Another is the Presbyterian form in which the governing power resides in assemblies, synods, presbyteries and sessions. . . . Another is the independent or congregational form in which the body is self-governing, each single and local church administering its own government by the voice of the majority of its members.[6]

The Church and Its Members

The nature of church membership has gone through a period of evolution in the United States. The early theory held that the members were bound to the church by a contract that did not differ substantially from other contracts entered into for business or pleasure.[7] The rules of membership would be determined by the general law of contracts. Although this theory is not followed in most of the jurisdictions today it was expressed as recently as 1901 by the Supreme Court of Alabama:

> The church is a voluntary association of its members united together by a *covenant* or *agreement* for the public worship of God, observing the ordinances of His house, the promotion of the spirituality of its membership, and the spirit of divine truth among others as they understand and teach it.[8]

[6] Thomas vs. Lewis, 224 Ky. 307, 6 S.W. 2d. 255 (1928); cf. Elston vs. Wilborn, 208 Ark. 277, 186 S.W. 2d. 662 (1945) in which a fourth group, "papal," is added.

[7] Stebbins vs. Jennings, 27 Mass. 172 (1830); Perry vs. Tupper, 74 N.C. 722 (1876).

[8] Hundley vs. Collins, 131 Ala. 234, 32 S. 575 (1901). Italics supplied.

The more prevailing opinion today is referred to as "the higher plane theory." It is followed by the federal courts of the states,[9] and places the relationship not upon a contract theory, but upon the higher plane of divine power. The clearest statement of this theory has been made by the Supreme Court of Tennessee in these words:

> The relations of a member to his church are not contractual. No bond of contract, express or implied, connects him with his communion or determines his rights. Church relationship stands upon an altogether higher plane, and church membership is not to be compared to that resulting from connections with mere human associations for profit, pleasure, or culture. The church undertakes to deal only with the spiritual side of men. It does not appeal to his purely human and temporal interests. Admission to its fold is prescribed only upon the word of God. It claims the power of the keys by divine and not human authority.[10]

In this theory of church membership there is ample room for the divine origin of the church. The basic tenets of the church, and this may include its form of government, are not prescribed by the members of the civil law, but are received from God Himself. Members who profess the common faith and submit to the rules and regulations of a particular church do so from the divine law, and not from any contractual rights.[11]

The Church and the State

Fundamental to any study of religious societies is the First Amendment to the Federal Constitution. The amendment was binding upon the Federal Government alone when it was

[9] Brown, *The Canonical Juristic Personality,* The Catholic University of America Canon Law Studies, n. 39 (Washington, D.C.: The Catholic University of America, 1927) p. 126 (hereafter cited as Brown).

[10] Nance vs. Busby, 91 Tenn. 303, 18 S.W. 874 (1891); cf. Watson vs. Jones, 80 U.S. 679, 20 L. Ed. 666 (1871).

[11] Brown, p. 123-124.

enacted, but, by an elliptic judicial interpretation, is now applicable to all of the states through the "due process" clause of the Fourteenth Amendment.[12] This amendment prohibits the establishment of any religion as the official religion of the Federal or State governments. This prohibition is without limit, and extends itself to any activity that would tend to such an establishment.

The second part of the amendment forbids any activity on the part of the state which would limit the free exercise of religion. This part of the First Amendment is not absolute, but does suffer exceptions. The amendment reads as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

Internal Life of the Churches

It is the clear and settled law of the American courts that civil tribunals will not interfere in the purely spiritual and internal affairs of religious societies. The courts will act only to protect temporal rights and to settle property rights. In the case of Elston vs. Wilborn, the Supreme Court of South Carolina stated:

> In the United States of America where Church and State are separate, the courts have steadily asserted their refusal to determine any controversy relating purely to ecclesiastical or spiritual features of a church or religious society. The courts intervene only to protect the temporal rights of such bodies, and to determine property rights.[13]

A great number of cases have been decided upon this principle of non-interference with the internal life of a church. Rights of membership and excommunication or expulsion are not within the province of the civil courts, but are to be de-

[12] Cantwell vs. Conn., 310 U.S. 296 (1940); Murdock vs. Penn., 319 U.S. 105 (1943); Everson vs. Board of Education, 330 U.S. 1 (1947); Zorach vs. Clauson, 343 U.S. 306 (1952).

[13] Elston vs. Wilborn, 208 Ark. 277, 186 S.W. 2d. 662 (1945); Ragsdall vs. Church of Christ in Eldora, 244 Iowa 474, 55 N.W. 2d. 539 (1952).

termined by the procedure set up in the individual church.[14]

All questions of faith and morals pertain to the internal life of the church, and are outside the province of the civil tribunal. The determination of what shall constitute heresy is for the churches alone, and the civil power will intervene only to declare its own incompetence.[15]

The appointment and removal of the clergy is also a matter of the internal life of the churches with which the civil law may not interfere. This has long been the law in the United States,[16] and has recently been reiterated by the Supreme Court of the United States in these words:

> Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.[17]

The mode of government of any religious body is the business of the particular church. It is not for the courts to determine what form of government the churches in the United States should adopt. In Klix vs. Polish Roman Catholic St. Stanislaus Parish, the legal doctrine was explained in these words:

> Many religious sects, and among them the Roman Catholic, are of world-wide extent and vast membership, with congregations, parishes and established hierarchies and councils in every land. For ages they have observed a uniform policy, not only in spiritual matters, but in the transaction of secular business

[14] "The rights of a member if expelled are to be determined by the laws of the Church." Grosvenor vs. United Society of Believers, 118 Mass. 78 (1875).

[15] "Civil tribunals possess no authority whatever to determine ecclesiastical matters such as heresy, etc." Wilson vs. Johns Island Presbyterian, 2 Rich. Eq. (S.C.) 192 (1846).

[16] ". . . the removal of a priest by the bishop cannot be interfered with by the court if the action of the bishop was within the laws and authority of the Catholic Church." Stack vs. O'Hara, 98 Pa. 213 (1881).

[17] Kedroff vs. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143, 97 L. Ed. 120 (1952).

> and the management of their properties. To force upon them an unaccustomed economy would introduce confusion and embarrassment; whereas to refuse them corporate capacity, except on the condition of renouncing their customs would be illiberal treatment by the state. . . . A statutory alteration of the form of church government may not constitute interference with matters of faith, yet, nonetheless, the right of every religious sect to preserve the peculiar economy it prefers, and perhaps has obeyed immemorially, touches closely if it is not part of, that religious freedom which American Constitutions guarantee.[18]

External Life of the Churches

Many of the activities of the churches will have effect upon the world around them. In order to insure the peace and security of the land, the civil courts will settle the rights of the individual which affect property rights, or have civil effects.

Almost from the founding of the nation, the courts have held that when such property or civil rights depend upon an interpretation of the ecclesiastical law, the courts are bound to enforce the ecclesiastical law as determined by the ecclesiastical tribunals. Thus in Lamb vs. Cain the court said:

> From these considerations the rule in this country has become elementary that when a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the right, and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepts such decisions as matters adjudicated by another legally constituted jurisdiction.[19]

It should be noted in this opinion that the ecclesiastical courts are considered as "legally constituted" and possess "jurisdiction" in the mind of the court.

[18] Klix vs. Polish Roman Catholic St. Stanislaus, 137 Mo. App. 347, 118 S.W. 1171 (1909).

[19] Lamb vs. Cain, 129 Ind. 486, 28 N.E. 13 (1891); First Presbyterian Church of Lincoln vs. First Cumberland Presbyterian Church of Lincoln, 245 Ill. 74, 91 N.E. 761 (1910).

In the famous case of Gonzalez vs. The Roman Catholic Archbishop of Manila, the issue was the appointment of a chaplain to a benefice worth a considerable sum of money in income. When the benefice was erected in 1820 a layman could hold the chaplaincy and have a priest say the sixty masses in his place. The chaplaincy was to be held by the nearest kin of the founder. Changes in the law of the Church now forbid the plaintiff, an untonsured boy of fourteen years of age, to possess any benefice. Upon appeal to the Supreme Court of the United States, the court decided the case upon the law of the Catholic Church:

> Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are, and whether the candidate possesses them. In the absence of fraud, arbitrariness, or collusion, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.[20]

The most frequent cause of litigation of church property is schism. Many factors may arise which cause a split in the membership around some doctrine or discipline with a resulting struggle for control of the church property. The leading case is Watson vs. Jones which resulted from a split in the Presbyterian Church as a result of the slavery issue just after the Civil War. The United States Supreme Court settled the conflict by invoking the decision of the highest court within the church as definitive. In doing so the court said:

> The rule of action which should govern the civil courts, founded in a broad and sound view of the relations of Church and State under our system of laws and supported by a preponderating weight of judicial authority is that, whenever the question of discipline or of faith or ecclesiastical rule, custom and law has been decided by the highest of these church judica-

[20] Gonzalez vs. Roman Catholic Archbishop of Manila, 280 U.S. 1, 50 S. Ct. 5, 74 L. Ed. 131 (1929).

> tories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[21]

The Watson case has been followed down to the present day. The Christian Science Church is based upon a hierarchal government. When the use of its name was denied to a local church, the Federal courts followed the Watson case and held itself bound to the decision of the highest judicatory of the Christian Science Church:

> Thus, because the plaintiffs are the highest authority and judicatory of the Mother Church and her branch churches, this court should not disturb their interpretations of the Church law from which they claim to derive the authority to grant or deny official church recognition to branch churches and use of branch church nomenclature.[22]

Perhaps the most famous of the modern schism cases is the Kedroff case which grew out of a schism in the Russian Orthodox Church in this country. The schismatics seceded from the Russian Orthodox Church because of its domination by the Patriarch from Russia. They succeeded in having the New York legislature pass a special law to change the structure of the Russian Orthodox Church. In a very finely reasoned opinion the United States Supreme Court overthrew the efforts of the New York legislature to intermeddle in the affairs of a church, and held that such legislation was a denial of the free exercise of religion. Even the fact that the head of the church was under the domination of a foreign state would not allow the state to enter upon the field of religion, and to legislate a new structure for a church. The court said:

> Legislation that regulates church administration, the operation of the Churches, the appointment of clergy . . . prohibits the free exercise of religion. . . . Ours is a government which by the ' law of its being ' allows no statute, state or national, that

[21] Watson vs. Jones, 80 U.S. 679, 20 L. Ed. 666 (1871).

[22] Jandron vs. Zuendel, 139 Fed. Sup. 887 (1955).

> prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in these cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.[23]

Conclusions

The general principles of American law in regard to religious societies may be summarized in the following statements:

1. Three classes of churches are recognized in the United States: prelatial, presbyterian, and congregational. The Catholic Church is recognized as of prelatial form.
2. Constitutional prohibitions forbid the state to interfere in the internal life of the churches.
3. Churches are not incorporated in the United States, but corporations or trustees are set up to perform civil actions for the churches.
4. In those external matters which affect property or civil rights which flow from or depend upon ecclesiastical discipline, the courts are bound to accept as definitive, and enforce, the ecclesiastical law.
5. American law does not concern itself with the origin or authority of the individual churches.

Roman Catholic Church Jurisdiction Over American Catholics

The Roman Catholic Church is world-wide in extent and claims jurisdiction over its members wherever they may reside. This Church is prelatial or hierarchal in structure with the Roman Pontiff as its highest authority. The internal life of the Catholic Church is subject to the exclusive control of the

[23] Kedroff vs. St. Nicholas Cathedral, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952).

hierarchy. The canon law makes provision for accommodating itself to the civil law of the various countries in its external life.

The Subjects of the Roman Catholic Church

Just as all men are not citizens of the United States so all men are not members of the Roman Catholic Church. Citizenship in our country can be obtained through birth or naturalization. In the Roman Catholic Church a man becomes a person or member of the Church through reception of a valid baptism.[24] Furthermore, to bind a member of the Church to purely ecclesiastical laws, the member must not only be baptized, but he must enjoy the use of reason, and have completed his seventh year of age.[25]

The jurisdiction of the Church extends to all the baptized of whatever rite. By a rite is understood any subdivision of the Church which possesses its own body of liturgical laws and disciplinary prescriptions.[26] The Latin Rite is most common in the United States, although the Ruthenian Rite has many members with their own hierarchy. Members of the other Oriental Rites are subject to the Latin hierarchy.[27]

The Structure of the Roman Catholic Church

The Roman Catholic Church is prelatial or hierarchal in structure. The authority of the Church is vested in prelates who rule over that part of the Church which has been confided to them. These prelates range from the Roman Pontiff, patriarchs, primates, archbishops, and bishops, down to the pastor of the local parish.

The supreme power of jurisdiction in the universal Church resides in the Roman Pontiff. His power to rule is inde-

[24] Canon 87; Motu Proprio, *Cleri sanctitati,* cn. 16 § 1.

[25] Canon 12.

[26] Coussa, *Epitome Praelectionum De Iure Ecclesiastico Orientali,* (3 vols., Romae: Pontificium Institutum Utriusque Iuris, Vol I, 1948), I, p. 14 (hereafter cited as Coussa).

[27] Motu Proprio, *Cleri sanctitati,* cn. 22.

pendent of any human authority and extends to all members of the Church of all rites, and wherever they may reside.[28] The power of jurisdiction of the Roman Pontiff includes legislative, judicial and executive or coactive power.[29] Inside the Catholic Church the Roman Pontiff is not only the supreme legislator with the power to make laws binding upon all the faithful,[30] but he is also the supreme judge of these laws,[31] with the power to enforce them by administrative or coactive power.[32]

The union of several dioceses into archdioceses, provinces, and patriarchates is the sole right of the Roman Pontiff.[33] In the Latin Church, patriarchs and primates have only the prerogatives of honor and precedence, unless given special powers by indult.[34] The Oriental Patriarchs are governed by the law given in Chapter VI of the Motu Proprio, *Cleri sanctitati.* Archbishops and metropolitans have limited powers within their territories.[35]

Bishops are set over particular territories known as dioceses, or exarchates in the Oriental Churches, which they rule by divine institution under the authority of the Roman Pontiff. The nomination of the bishops is the prerogative of the Ro-

[28] Canon 218; Motu Proprio, *Cleri sanctitati,* cn. 162.

[29] Coronata, *Institutiones Iuris Canonici,* (5 vols. Taurini-Romae: Marietti, Vol. I, 4 ed., 1949), I, n. 275 (hereafter cited as Coronata); Abbo-Hannan, *The Sacred Canons,* (2 vols., St. Louis: B. Herder Book Co., 1952), I, p. 252 (hereafter cited as Abbo-Hannan).

[30] Ottaviani, *Institutiones Iuris Publici Ecclesiastici,* (2 vols., Romae: Typis Polyglottis Vaticanis, Vol. I, 3 ed., 1947; Vol. II, 2 ed., 1936), I, p. 214 (hereafter cited as Ottaviani); Bender, *Ius Publicum Ecclesiasticum,* (Bussum in Hollandia: Paulus Brand, 1948) p. 65 (hereafter cited as Bender).

[31] Canon 1569 § 1; Motu Proprio, *Sollicitudinem Nostram,* cn. 32 § 1; see Ottaviani, I, p. 257; Bender, p. 76.

[32] Ottaviani, I, p. 294; Bender, p. 70.

[33] Canon 215; Motu Proprio, *Cleri sanctitati,* cn. 159.

[34] Canon 271.

[35] Canons 271-280; Motu Proprio, *Cleri sanctitati,* cns. 315-339.

man Pontiff.[36] These dioceses, or exarchates, may be erected, suppressed, altered or divided only by the Roman Pontiff.[37] It is the duty of the bishops to rule their diocese, and in the exercise of their office they possess legislative, judicial and coactive power according to the norms of the canon law.[38] Their power extends to both spiritual and temporal works of the Church. The dioceses are divided into parishes and quasi-parishes which consist of a definite territory within the diocese with its own people, a church and rector.[39] Groups of parishes are united in districts known as deaneries.[40]

The Church also establishes other subordinate moral persons within the Church in order to carry out its work, and to provide for the salvation of souls.[41] The erection of religious institutions for men and women who desire a life of perfection through the profession of the evangelical counsels has long been a function of the Church.[42] The establishment of hospitals, orphan asylums and similar institutions of charity,[43] and the erection and conducting of schools at all levels of education is a common practice of the Church throughout the world.[44]

Thus the structure of the Roman Catholic Church is hierarchal in its nature. The ruling power in the Church is not vested in the local congregation nor in synods or assemblies, but in the hierarchy of ordained ministers. Such organization is traditional in the Catholic Church and has been the method of government since the early Christian era.

[36] Canon 329, § 1, 2; Motu Proprio, *Cleri sanctitati,* cn. 392.

[37] Canon 215; Motu Proprio, *Cleri sanctitati,* cn. 159.

[38] Canon 335; Motu Proprio, *Cleri sanctitati,* cn. 399.

[39] Canon 216; Motu Proprio, *Cleri sanctitati,* cn. 160.

[40] Canon 217; Motu Proprio, *Cleri sanctitati,* cn. 161.

[41] Canon 100; Motu Proprio, *Cleri sanctitati,* cn. 27.

[42] Canon 487; Motu Proprio, *Postquam Apostolicis,* cn. 1.

[43] Canon 1489.

[44] Canon 1375.

The Internal Life of the Roman Catholic Church

The Roman Catholic Church maintains that it is a perfect society, that is, a society complete within itself, dependent upon none for the means to accomplish its purpose, the sanctification of its members and the procurement of their supernatural destiny, the Beatific Vision of God.[45] The power of jurisdiction of the Church is thus a public power or faculty of ruling its members in those matters which are ordained to the end of society.[46]

The matters over which the Church has jurisdiction can be deduced from the purpose for which the Church has been established, the sanctification of souls. All matters which affect the faith or morals of the faithful are within the province of the Church. It is the right and duty of the Roman Pontiff and the hierarchy to conserve and effect the unity of faith and morals among the faithful.[47] The right to establish creeds and catechisms, to condemn heretical doctrines, and to authentically interpret and teach all that pertains to faith and morals must be possessed by the Church.[48]

Complete control is exercised by the Church over all the means that have been established for the sanctification of its members. The Holy Sacrifice of the Mass, the seven Sacraments, liturgical services, and authority to preach the gospel are intimately tied in with the office of the Church to lead its members to union with God.[49]

In the fulfillment of its role in the world, the Church must be able to erect, divide, or supress dioceses, parishes, missions

[45] Ottaviani, I, p. 173; Bender p. 42.

[46] Regatillo, *Institutiones Iuris Canonici* (4 ed., 2 vols., Santander: Sal Terrae, 1951), I, n. 365 (hereafter cited as Regatillo); cf. Abbo-Hannan, I, p. 251.

[47] Wernz-Vidal, *Ius Canonicum ad Codicis Normam Exactum*, (7 vols. in 8, Romae: Apud Aedes Universitatis Gregorianae, Vol. II, 3 ed. 1943), II, n. 424 (hereafter cited as Wernz-Vidal).

[48] Wernz-Vidal, II, n. 433.

[49] Wernz-Vidal, II, n. 431.

and churches. The appointment of all ministers whether as priests, bishops, or clerics, to their offiices must be under the control of the Church.[50]

In order to defray the expenses incurred in the public worship of God, to cover the costs of maintaining the clergy, and to pay for the expenses necessarily incurred in fulfilling her mission in the world, the Church has the right to demand from her faithful the necesary financial support. The civil power has no right to interfere in this support of the Church; the right to such support is independent of any authorization by the civil power.[51]

The External Life of the Roman Catholic Church

Most of the conflicts with the state arise in the field of property, and property rights. The Church claims for herself the right to acquire temporal goods by any of the means which are available to others whether by natural or positive law.[52] The Church foresees that she must hold property that will be subject to the jurisdiction of the state also, and hence provides for her holding of the property by any just means of natural or positive law. The precise nature of the tenure of temporal goods is not defined in the church law, but is left to the procedure of each territory.

The Church does, however, set up the economy under which the goods of the Church shall be administered. As the supreme head of the Church, the Roman Pontiff is also the supreme administrator and dispenser of all ecclesiastical goods.[53] The local ordinary, the Bishop or Exarch, is charged with the administration of all ecclesiastical goods which are in his terri-

[50] Wernz-Vidal, II, n. 434.

[51] Canon 1496; Motu Proprio, *Postquam Apostolicis,* cn. 233.

[52] Canon 1499; Motu Proprio, *Postquam Apostolicis,* cn. 236, § 1.

[53] Canon 1518; Motu Proprio, *Postquam Apostolicis,* cn. 257.

tory and which have not been removed from his jurisdiction. He must see that subordinate administrators are charged with opportune instructions and directions for the goods under their control.[54] The particular law on the administration of ecclesiastical goods is found in canons 1518-1551, and in the Motu Proprio, *Postquam Apostolicis* canons 257-301. The administration of the temporal goods of religious communities is governed by canons 531-537, and the Motu Proprio, *Postquam Apostolicis,* canons 63-69.

The Origin of Roman Catholic Church Jurisdiction

The fundamental law on the jurisdiction of the Roman Pontiff is found in canon 218 which claims the supremacy " a quavis humana auctoritate independens," independent of any human authority.[55] Thus the powers of the Roman Pontiff and the Catholic Church do not depend upon the state for their right to exist, or for permission to function. The origin of these powers is from God Himself.[56]

The existence of the Catholic Church and the Apostolic See with the nature of a moral person depends upon divine ordination, and not upon the consent of its members or the civil power.[57] There can be no question of contract law settling the rights of members of the Catholic Church. The existence of the Church does not depend upon the action of its members.

Conclusions

The following statements should be made about the general principles of the canon law of the Catholic Church:

[54] Canon 1519; Motu Proprio, *Postquam Apostolicis,* cn. 261.

[55] This phrase was changed in the Motu Proprio, *Cleri sanctitati,* canon 162 to read "a nulla humana auctoritate dependens," dependent upon no human authority. The meaning is the same.

[56] Abbo-Hannan, I, p. 282; Coronata, II, n. 309; Regatillo, I, n. 390.

[57] Canon 100, § 1; Motu Proprio, *Cleri sanctitati,* cn. 28, § 1.

1. All validly baptized men are subjects of the Roman Catholic Church.

2. The Roman Catholic Church is hierarchal or prelatial in government.

3. The Catholic Church claims for itself the right to control its own internal life according to its own laws.

4. The Catholic Church claims for itself the right to possess property according to the usual norms of natural or positive law, and to administer it according to its own law.

5. The origin of the Catholic Church and the Apostolic See is to be found in divine ordination. The Church and the jurisdiction of the Pope and his subordinates in the hierarchy are independent of the civil power or any human authority.

Comparison

The fundamental law of the United States and the law of the Roman Catholic Church are not in basic conflict:

1. The membership of churches under American law is not based upon contract law, but upon the " higher plane " theory. The Catholic Church claims such divine intervention in her founding.

2. The law of the United States forbids the state to interfere in the internal life of the churches. As a hierarchal church, the Roman Catholic Church governs her internal life without regard for the state.

3. As regards temporalities and civil rights, the American law provides for trustees or corporations to act in the name of the churches. The Roman Catholic Church claims the right to hold property and to place civil acts in any just manner provided by the natural or positive law.

4. American law does not claim to give individual churches the right to exist, nor invest them with any power; it does not concern itself with the origin of the churches' power and authority. The Roman Catholic Church maintains that its au-

thority derives from God Himself, and is independent of any human authority.

It is in the light of these conclusions that individual areas of conflict should be studied. In many cases the conflicts will not be conflicts between church and state at all, but rather difficulties arising about the rights of Catholics as citizens. The fundamental law of both mesh like cogs in a wheel, and assures their continued existence side by side in a state of harmony.

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PERMISSIBLE COHABITATION IN INVALID MARRIAGES *

TIME and again, His Holiness, Pope Pius XII, has implored priests to have a holy anxiety for the sheep outside the fold who have never had, or have lost the faith; and also for the sheep within the fold who, as victims of sin, are deprived of unity in grace. The insistent urgency of his pleas in behalf of such souls is evident in the following excerpts:

> As priests of Christ, we must labor to make the Redemption of the human race, which He accomplished, as effective as possible in the soul of each individual. Bearing in mind particularly the grave needs of our time, we must endeavor to bring back to the precepts of Christianity those brethren who have strayed from the right road, or are blinded by passion.[1]
>
> We implore you, beloved sons, to be ever filled with a holy anxiety for the sheep who are outside the fold, either because they never had the faith or have lost it. . . . There are other sheep within the fold who have no intention of straying from it by withdrawing from either the unity of the faith or the unity of government; and yet, by remaining victims of sin, which is opposed to unity in grace, they deserve to be called dead members of the Mystical Body of Christ, which is the Church. The pastor, the parish priest, must above all find the best means to bring about their resurrection. To all these dead members the good pastor must restore life.[2]
>
> In considering the nature of his duties, the specialist in Canon Law should realize that Canon Law, like everything

* Paper read by His Excellency, the Most Reverend John J. Król, J.C.D., Auxiliary Bishop and Vicar General of the Diocese of Cleveland, at the annual regional meeting of the Midwest Chapter of The Canon Law Society of America on May 27, 1958 at Madison, Wisconsin.

[1] Apostolic Exhortation, *Menti Nostrae,* Sept. 23, 1950, *AAS,* XLII, 699.

[2] Discourse to Lenten Preachers of Rome, March 27, 1953, *AAS,* XLV, 242-3.

> else in the Church, is wholly directed to the care of souls, so that by the aid and guidance of laws too, men may secure possession of the truth and grace of Christ, and may live, grow and die in holiness, piety and fidelity to the faith.[3]

The specialist in Canon Law, just as the parish priest, must extend his ministry to those who were never in the fold, to those who deserted the fold, and to those who, without deserting the fold, have abandoned a life of grace. He must lead the "*alias oves*"[4] to the fold. He must restore those, who deserted the "*fontem aquae vivae*"[5] to the fold. He must find the best means of restoring life—"*ut vitam habeant*"[6]—to the dead members within the fold. He must, accordingly, approach souls involved in invalid marriages with a holy anxiety and with the determination to use, without compromising principles, every available means to lead them to the unity of faith and grace.

Through the Family Life Bureau of the National Catholic Welfare Conference, the Bishops of our Country carry on a vast constructive program, chartered on the encyclical "Christian Marriage" of Pope Pius XI, in defense of marriage and unity of the family. The program, operating through a variety of national, diocesan and parochial organizations, is directed not only to the spiritual and supernatural aspects of marriage, but also to the natural and material aspects, such as housing, wages, medical care, child welfare, accident and unemployment insurance pensions, and other factors related to family security. The program is evident in pre- and post-marriage courses of instruction, special retreats for brides, grooms, and spouses, Cana Conferences, marriage and domestic relation clinics, and other forms of activity designed to promote the Christian concept of marriage in principle and in

[3] Discourse on the IV Centenary of Gregorian University, October 17, 1953, *AAS*, XLV, 688.

[4] John, 10:16.

[5] Jer., 2:13.

[6] John, 10:10.

practice. Moreover, there is maintained at a tremendous sacrifice, the amazing network of catholic schools, and an extensive program of catechetical instructions for the young and for adults, in which the Divine Plan for marriage is emphasized. This program has been effective and gives promise of increased fruitfulness in the future.

The program is pursued relentlessly in a society which is subject to pagan and materialistic influence, and which shares a culture partly moulded by secularism. It is a society in which some members labor under the illusion of the natural goodness of man; attach primacy of importance to the present good of the individual, rather than to the welfare of the community; identify the precepts of civil law with those of morality, and taking the cue from screen romances, assume that marriage must be both a perfect fulfillment of romantic love and the pursuit of full self-realization for both partners. Such a society has placed its stamp of approval on the practice of divorce with devastating effects upon the religious and moral fibre of our civilization. It is not surprising, therefore, that living in such a society, some Catholics, despite the best efforts of the Church, succumb to the divorce disease, and subsequently become embroiled in canonically bigamous marriages.

Such people, affected with lethargy of the spirit, anemia of the will and frigidity of the heart, enter invalid unions thoughtlessly, or after a struggle of conscience, in which divine principles yield to human emotions. They try to justify their actions with specious arguments. They blame the Church for not understanding or ignoring their problem, and for declining the " opportunity " to witness the invalid union. They feel that God understands and approves their action. They try to vindicate their action by expending extraordinary effort to make their sinful union a success, and profess to enjoy great marital bliss. They incur new obligations and ties.

In the course of time, however, the disturbing voice of conscience becomes louder and more insistent, and they begin the

struggle to return to a life of grace. Their first approach is invariably met with a demand for complete separation; but they are not free to slough off obligations incurred by the invalid union—obligations which bind in justice and which are enforceable at law. They cannot evict a sick and helpless spouse, revive the scandal of a bad marriage, or advertise the hitherto little known invalidity of the marriage. In some cases, there may be a possibility of validation by way of a Petrine or Pauline Privilege, but again, the problem of baptizing a person, who lives in a sinful union, looms as an obstacle. They are strays who found themselves, and who seek admission to the fold.

The program in defense of the sanctity of marriage and unity of the family has, just as any other program of action within the Church, the one ultimate objective of promoting the sanctification and salvation of souls. The program is a means to an end and not an end in itself. Since it is not completely successful, it must be complemented with a curative program. As good shepherds, we must show concern for those who, albeit through their own recklessness, become matrimonial casualties and are in danger of losing their soul.

The program of reclaiming such casualties presents a problem which concerns not only the individuals concerned, but also the community. In pursuing its Divine Mission, the Church must promote the salvation of each and every soul; but it must also avoid anything that might encourage others to risk the salvation of their soul. It must operate within the framework of the principles that scandal must be avoided; the good of the community supersedes the good of the individual; and that there can be no toleration of a situation which exposes a person to the danger of losing his soul.

The delicate and serious nature of this problem is well appreciated in theory and in practice. Canonists and theologians uniformly warn that the brother-sister permission is a dangerous thing (*res plena periculis*), and should practically never (*fere numquam*) be granted. As a result, there was a tend-

ency, even among Chancery Officials, to regard the brother-sister arrangement as something highly impractical. This approach is, indeed, a safe one, but it can be carried to unwarranted extremes. The fact is, that such an arrangement is available as a practical solution in some cases. Since we are dedicated to the cause of saving souls, we must, as the Holy Father said, "find the best means to bring about the resurrection" of the dead members in the fold, and bring life to those outside the fold.

Ten years ago, as President of the Canon Law Society of America, I called attention to the fact, that the requests for such permission were increasing; that the subject was of urgent importance to Chancery Officials, parish priests and confessors; that the literature on the practical principles and procedure in handling such cases was meager; and that there seemed to be a conspiracy of silence on the methods in processing such petitions in different dioceses. I made a strong plea for a volunteer to develop and read a paper on the subject at one of the national meetings of the Society. As frequently happens, there was concurrence of opinion that such a subject should be developed, but no one volunteered. The following year, my successor in office prevailed upon me to act in accord with my own convictions and to pioneer a discussion on the subject of brother-sister permissions. I yielded, with some reluctance and misgivings, and only in the hope of stimulating others to give the subject the serious attention it merits.

The paper was read in New York on October 11, 1950 at the XII Annual National Meeting of the Canon Law Society.[7] The keen interest in the subject at the meeting and the reaction to the paper after its publication were most rewarding. The method of procedure developed in the Diocese of Cleveland, outlined in the paper, and even the petition form were adopted in some dioceses. Discussion on certain aspects

[7] Król, "Permission to Parties Invalidly Married to live as Brother and Sister", *The Jurist*, XI (1951), 7-32.

of the subject and on the suggested method of procedure appeared in various publications.[8]

Two years later, the paper and procedure suggested therein were substantially repeated at the Mountain States Regional Conference in Pueblo, Colorado.[9] Two years later, a doctoral dissertation in Canon Law was published on the subject.[10] Two years later, another paper on the same subject was read at the annual meeting of the Northwest Regional Chapter of the Canon Law Society of America, which was held in Baker, Oregon.[11] My efforts to serve as a catalyst in stimulating discussion on the subject have been effective beyond my fondest hopes.

I ventured to discuss the subject with some serious misgivings. I was fearful lest some zealous soul might pick up the fervent plea in behalf of the invalidly married, and lend it a wave of emotional currency, overlooking the relevant canonical and moral principles which were spelled out in the paper. It is gratifying to report that my misgivings were in vain. The canonists and theologians in our country gave ample evidence that, while they acknowledged the practicability of the brother-sister arrangement as a solution in some cases, they were also keenly aware of the canonical and moral principles, which restricted the applicability of such a solution.

[8] P. J. Lydon, *Priest,* VII (Jan. 1951), 37-38; Gerald Kelly, S.J., "Notes on Moral Theology", *Theological Studies* XIII (1952), 80-81; Joseph F. Marbach, "Living as Brother and Sister: a Last Resort in Marriage Cases", *Priest,* X (Oct. 1954), 861-66; and others.

[9] Rev. James P. Godley, "Brother-Sister Arrangement in Invalid Marriages", October 12, 1952, *The Jurist,* XIV (1954), 253-74.

[10] Bernard O. Sullivan, "Legislation and Requirements for Permissible Cohabitation in Invalid Marriages", The Catholic University of America Canon Law Studies, n. 356. Washington, D.C., The Catholic University of America Press, 1954.

[11] Very Rev. Matthew M. Crotty, "The Invalidly Married Living as Brother and Sister", The *Jurist,* XVII (1957), 88-99.

In 1953, Father Gerald Vann, O.P. authored a rather unfortunate article on the subject of "Muddled Marriages Dilemma".[12] While Father Vann's zeal must be admired, his emotional appeal, and his errors, which cannot be justified on grounds of rhetorical license, are inexcusable and unworthy of a theologian. The article was reprinted in the *Catholic Worker*[13] and in *Worship*.[14] It appeared in digest form in the *Sorrowful Mother Novena Notes*[15] and in the *Catholic Digest*.[16] The latter was officially reprimanded by the late Archbishop John J. Murray, for even publishing a digest of such an article[17] and subsequently printed a condensed refutation of the article.[18]

Father Vann's article was soundly refuted by Father Connell, C.SS.R.,[19] by Father Miller, C.SS.R., in the *Ligourian*,[20] and by Fathers Carr and Marbach in the *Priest*.[21]

I am aware of only one attempt to defend Father Vann's position, and that was by his confrere and former dogma professor, Father John Fearon, O.P., who, in reality, took exception to one of the refutations.[22] An explanation by Father Vann had been promised, but has not appeared. Instead,

[12] *Blackfriars*, XXXIV (Sept. 1953), 374-80.

[13] XX (Oct. 1953), 3.

[14] XXVII (Nov. 1953), 533-39.

[15] XVII (Nov. 20, 1953), 7, 13.

[16] XVIII (Jan. 1954), 13-16.

[17] *Catholic Digest*, XVIII (March 1954), 10.

[18] *Catholic Digest*, XVIII (June 1954), 111-14.

[19] "The Proper Attitude toward Muddled Marriages", *American Ecclesiastical Review*, CXXX (Jan. 1954), 54-55, and "More about the Bad Marriage Dilemma", *op. cit.*, (June 1954), 112-17.

[20] *The Bystander, Ligourian*, XLII (Feb. 1954), 111-14.

[21] Aidan Carr, O.F.M. Conv., "Pity vs. Principles", *Priest*, X (Feb. 1954; and "Again: Pity vs. Principles", *op. cit.*, (July 1954), 603-7; and Joseph F. Marbach, "Living as Brother and Sister, a Last Resort in Marriage Cases", *Priest*, X (Oct. 1954), 861-66.

[22] "Father Carr, Prudence and Theology", *Priest*, X (May 1954), 415-20.

there was a complete criticism of the article by a Dominican moralist at the Angelicum, Pedro Lumbreras, O.P.[23] Though he tried to make excuses and allowances on the grounds of rhetorical exaggerations, Father Lumbreras gave a thorough critical analysis of the article and pointed out its many errors.

The controversy started by Father Vann brought out, in bold relief, a glowing tribute to the canonists and theologians of our country. They are zealous souls, and manifest a holy anxiety to bring all souls to the unity of faith and of grace. They are anxious to restore the sinner to peace with God—but not at all costs, and certainly not by compromising the principles of the Gospel. They show compassion to the sinner, but they are sensitive to the warning of Our Holy Father: "Of a truth, he who to please men would gloss over their evil inclinations or be indulgent about their incorrect ways of thinking or acting, thereby prejudicing Christian teaching and integrity of morals, would be betraying his ministry." [24]

Principles Involved

Remedies for an Invalid Marriage

There are five possible approaches to the problem of an invalid marriage. The first is validation by renewal of consent, or in extraordinary circumstances, by a sanation. The second, available only when the incurable nullity of a putative marriage is unknown to both parties, is to allow the couple to remain in good faith. The third, which is the normal approach to an incurably null union, is to enjoin complete separation. The fourth is to explore the reasonable hope of validation by way of annulment or a dissolution of a prior marriage. The fifth, a measure of last resort, is to allow the couple to live as brother and sister. The last two approaches are of current interest, since they involve a temporary or permanent brother-sister arrangement.

[23] "The Muddled Marriage", *Blackfriars* XXXV (Dec. 1954), 527-38.

[24] Apostolic Exhortation, "*Menti Nostrae*", *AAS*, XLII, 679.

Validation by way of Pauline or Petrine Privilege

A temporary brother-sister arrangement is practically inevitable in Pauline Privilege cases when the petitioner is involved in an invalid marriage. The Privilege is available only to those who are converted and baptized, because the baptism must precede the interpellations.[25] Permissions have been granted for grave reasons to invert this order, but only by way of exception.

The Norms issued on May 1, 1934 by the Holy Office, which serve as a guide in processing Petrine Privilege cases, require information about the time and motives which induced the petitioner to be baptized—"*ad baptismum suscipiendum*". They do not specifically require that the decision to submit to baptism be actualized before the completion of the process, and we know that favorable decisions have been issued before the baptism of the petitioner took place. It is, however, a reasonable practice of some Tribunals to require conversion and baptism, before certifying the sincerity of conversion, and recommending the petition in Favor of the Faith of the petitioner.

Since in one case, baptism is required by law, and in the other, by reasonable practice of some Tribunals, the one hope for completing such cases is the baptism of the petitioner. If he is involved in an invalid marriage, it is reasonably assumed that he lives in a proximate occasion of sin. Since the Sacraments must be denied to those who refuse to avoid a proximite occasion of sin, the only hope for baptism in such cases is that the occasion is neither voluntary nor proximate.

Baptism of an Invalidly Married Person

A proposition, condemned by Innocent XI, makes it clear that the Sacraments must be denied to a person who refuses to avoid a voluntary proximate occasion of sin.[26] One of the

[25] Canon 1121; S.C.P.F., response of Jan. 16, 1803, *Fontes*, n. 4671.

[26] Condemned Proposition, n. 61, "Potest aliquando absolvi, qui in proxima occasione versatur quam potest et non vult deserere, quin imo directe et ex proposito quaerit aut ei se ingerit."

conditions required by Canon 752, § 1, for the lawful reception of baptism is contrition, or at least attrition for all mortal sins. In defining contrition as "a sorrow and detestation for sin committed, with a purpose of sinning no more", the Council of Trent made it clear that the firm purpose of avoiding sin in the future is an indispensable requisite for contrition.[27] Theologians uniformly agree that the firm purpose of avoiding sin must extend to the avoidance of the proximate occasion of sin. There are two schools of thought on the question of what constitutes a proximate occasion of sin, and its corollary of determining the gravity of the obligation of avoiding the single occasion of sin.[28] The exponents of both schools of thought agree that one has a serious obligation of giving up the habit of frequenting the voluntary occasion of sin in which he often sins mortally.[29] On this point, Ayrinhac writes: "Real attrition would not exist in a catechumen who would not manifest willingness to obey all the laws of God and of the Church, to give up superstitious practices, dismiss an illegitimate wife, etc. . . .".[30] The same idea was expressed by the Holy Office in response to a question whether an adult pagan who was near death could be baptized if he merely promised to retain but one of his many wives if he recovered. The Holy Office declared that he would have to dismiss all but

[27] Conc. Trident., sess. XIV, *de poenit.*, cap. 4, can. 5.

[28] Napholc, P. "De Vera Proximae Occasionis Peccati Notione", *Periodica*, Vol. XXI (1932), pp. 1-34; 129-157; Fabregas, "De Obligatione Vitandi Probabile Periculum Peccandi", Periodica, XXX (1941), pp. 20-45; Regan, "The Proximate Occasion of Sin according to St. Alphonsus", *The Australasian Catholic Record*, XXVI (1945), pp. 97-109; Kelly, "Notes on Moral Theology", *Theological Studies*, XI (1950), pp. 64, 65.

[29] Kelly, *op. cit.*, p. 65; Genicot-Salsmans, "*Institutiones Theologiae Moralis*", (ed. 11, 1927) II, p. 330; Merklebach, *Summa Theologiae Moralis*, (ed. 3, 1939) III, n. 667; Prümmer, *Manuale Theologiae Moralis*, (ed. 8, 1936), III, n. 451; Vermeersch, *Theologia Moralis*, (ed. alt., 1927), III, n. 542; Aertnys-Damen, *Theologia Moralis*, (ed. 14, 1944), II, n. 476.

[30] *Legislation on the Sacraments*, (1928), p. 30.

his one lawful wife before he could be baptized.[31] We cannot disregard the serious import of this response. The question concerned a dying pagan adult and his request for the sacrament of baptism, which is necessary for salvation. The only logical inference is that the Holy Office regarded such a circumstance as a voluntary proximate occasion of sin, which would have to be removed under pain of being refused the Sacraments.

In view of the foregoing, it is easy to appreciate the problem created by a catechumen who refuses to separate from his unlawful wife. In these circumstances, the only available solution—the only possible adjustment without compromise of principles—is the brother-sister arrangement. This solution is possible only, in a particular case, if the apparent proximate occasion of sin is actually a remote one, and at the same time, there is no danger of scandal.

Occasion of Sin

An occasion of sin is generally defined as some external circumstance—a person or object—which attracts to, and affords a facility for sin. The occasion is something external and is not to be identified with the internal propensity arising from human frailty, inordinate passions, evil habits and the like.[32] Some authors define an occasion of sin as an external circum-

[31] S.C.S. Off. (Quebec) 10 Maii, 1703. *Fontes,* n. 765:

6. "Utrum baptizari possit barbarus adultus morti proximus, qui plures secum habens mulieres, pollicetur se nonnisi unam servaturum, si pristinae sanitati restituatur, sed qui dimittere non vult alias; an teneatur missionarius compellere, et insistere ut barbarus dicat quam ex omnibus foeminam electurus sit in coniugem, vel utrum sufficiat barbarum promittere se nonnisi unam habiturum.
R. Ad 6: Non licere, si ex illis mulieribus una sit uxor legitima et ceterae concubinae, nisi prius eiectis concubinis; si vero habuerit omnes tamquam legitimas uxores, pariter non licere, nisi eiectis omnibus praeter primam; si cum ea valide contraxit, et velit secum cohabitare absque Creatoris iniuria. Si tandem vel omnes simul et unico actu acceperit in uxores vel omnes habeat ut concubinas, non licere, nisi eiectis omnibus ante susceptionem Baptismi."

[32] Prümmer; *op. cit.,* III, n. 449: "Ergo occasio peccandi non est passio inordinata vel fragilitas poenitentis, cum ista sint quid intrinsecum."

stance which induces the danger of sin—*periculum peccandi*.[33] Thus, Napholc, for example, insists that both the external and internal elements are essential components of an occasion of sin, and there is no occasion unless both are present.[34] Even if we apply this second and traditionally stricter definition to the case of an invalidly married couple who, because of advanced age and illness, have lived in continence for some time, we would be justified in concluding that they are not living in the occasion of sin.

An occasion of sin may be continuous; e.g., cohabitation in an invalid union, or, disjunctive, when the occasion occurs at intervals.

An occasion of sin can be remote or proximate. A remote occasion is one which presents but a slight danger of sinning—in which a person rarely sins. Such occasions exist universally, and they neither can nor must be avoided. The definition of a proximate occasion of sin is a subject of controversy. Some Theologians defend St. Alphonsus' definition that a proximate occasion of sin is something external to a person, which places him in grave danger or serious probability of sinning mortally; even though it is also probable that, in spite of the occasion, sin will be avoided.[35] Others, following the more liberal view of Lugo, define a proximate occasion of sin as one in which a person rarely, if ever, abstains from serious sin, or as one in which a person sins always or at least frequently.[36] The controversy is limited to the single occasion of sin. Our problem is not the single occasion of sin, but a continuous occasion to which a couple, in an invalid marriage, are exposed. The

[33] Napholc, *op. cit.*, pp. 150, 151: "Occasio, prout hic sumitur, est circumstantia homini exterior quae periculum peccandi inducit." Cf. also, Aertnys-Damen, *op. cit.*, II, n. 468; Merklebach, *op. cit.*, III, n. 663.

[34] *Op. cit.*, p. 151: "Hinc duabus ex partibus essentia occasionis componitur. Potest in maiore gradu adesse unum vel alterum, sed utrumque necessario adesse debet."

[35] Cf. Regan, *op. cit.*, p. 98: Ter Haar, *De Occasionariis et Recidivis*, (ed. alt., 1939), p. 6.

[36] Genicot-Salsmans, *op. cit.*, II, n. 371. Cf. also Fabregas, *loc. cit.*

proponents of both sides agree that there is a serious obligation of giving up the habit of frequenting a voluntary occasion in which a person often sins mortally.[37] Accordingly, prescinding from the controversy regarding the single occasion of sin, we must conclude that as long as the invalidly married couple is in a voluntary proximate occasion of sin, they have no choice except to effect a complete separation.

A proximate occasion is free or voluntary if it can easily be avoided; otherwise, it is considered a necessary occasion. The latter can be physically or morally necessary. Physical necessity is verified in the case of a lawful wife who is exposed to the danger of sin by living with her husband. A morally necessary proximate occasion is one that can be avoided, but not without grave difficulty and harm. Authors generally consider company keeping, with the prospect of an early marriage, as a necessary proximate occasion of sin.

From the foregoing, we can, for the purposes of this discussion, deduce the following practical principles:

1. It is absolutely necessary to avoid any occasion of sin which, in a particular case, is tantamount to sin. If the occasion constitutes a proximate danger to eternal salvation, then, in accordance with the words of Our Lord concerning the plucking out of the eye and the cutting off of the hand (Matt. 5:29), it must be abandoned even at the risk of one's life.[38]
2. It is neither possible nor necessary to avoid a remote occasion of sin. Such occasions exist everywhere for everyone in this world.

[37] Kelly, *op. cit.*, p. 65: Genicot-Salsmans, *op. cit.*, II, n. 372,—"Sic ponamus iuvenem, qui crebro peccavit cum amasia, saepe etiam eam adire quin graviter contra castitatem delinquat: hunc censemus sub gravi teneri ad abrumpendam hanc consuetudinem, in qua pergere nequit sine morali certitudine novorum lapsuum. . . ."

[38] Ter Haar, *Casus Conscientiae,* I, p. 62: "Poenitens, qui in occasione moraliter necessaria, adhibitis etiam remediis, eodem fere modo semper relabitur, ita ut probabilis spes eius emendationis iam non supersit, hanc occasionem physice relinquere debet, etiam cum gravissimo suo incommodo aut damno."

3. A vountary proximate occasion of sin must be avoided under pain of denial of the Sacraments. This is evident from the propositions condemned by Innocent XI.[39]
4. Physically necessary proximate occasions of sin cannot be avoided. They must, however, be turned into remote occasions by vigilance and by the use of natural and supernatural aids.
5. It is lawful to expose oneself to a morally necessary proximate occasion of sin, provided there is a firm and sincere willingness to use the means prescribed to make the materially proximate occasion formally remote.[40]

It must be emphasized that while some theologians defend what is regarded as a rigorous definition of a proximate occasion, they, as well as the defenders of the lenient definition, agree that there are occasions of sin which, though normally to be avoided, can be lawfully frequented if such frequentation is morally or physically necessary. Such, in fact, was the view of St. Alphonsus.[41]

It is of particular importance to appreciate precisely what, in the opinion of theologians, constitutes a necessary proximate occasion of sin. Ter Haar, who defends the view of St. Alphonsus, provides us with an excellent example.[42] He presents the case of a couple in an incurably invalid union. The solution which he proposes is:

[39] Denzinger, n. 1211-1213:

61. "Potest aliquando absolvi, qui in proxima occasione peccandi versatur quam potest et non vult omittere, quin immo directe et ex proposito quaerit, aut ei se ingerit."
62. "Proxima occasio peccandi non est fugienda, quando causa aliqua utilis aut honesta non fugiendi occurrit."
63. "Licitum est quaerere directe occasionem proximam peccandi pro bono spirituali vel temporali nostro vel proximi."

[40] Prümmer, *op. cit.*, III, n. 450.

[41] Regan, *op. cit.*, p. 107; Ter Haar, *De Occasionariis et Recidivis*, (ed. alt., 1939), p. 116.

[42] Ter Haar, *Casus Conscientiae*, (ed. 3, 1944), I, n. 158.

. . . omnino insistendum est separationi physicae, nisi cohabitatio et occasio proxima sit vere necessaria. Haec necessitas adesse potest, v.g.: a) si complices iam inierunt matrimonium civile quod rumpi nequeat; b) si iam nati sunt infantes quorum educationi provideri debeat; c) si cui ex separatione damnum valde grave vel gravis infamia oriatur, haec tamen ratio non facile admittatur, utpote saepe ob passionem exaggerata; d) 'si femina inquit S. Alphonsus, nequiret manuum labore se alere, aut in aliqua domo servire, aut mendicare sine dedecore aut aliquo gravi incommodo' (III, 437): in hoc autem casu femina saepe in aliquo instituto locari potest.

Si neque matrimonium, neque separatio physica fieri potest, *alia remedia* efficacia sunt praescribenda, quibus periculum peccandi e proximo reddatur remotum; de hisce vide Opus, n. 142. Imprimis nitendum est, ut in separatis lectis vel etiam cubiculis dormiant, ut a signis specialis amoris omnino se abstineant, imo etiam ut solum cum sola esse, quantum possint evitent.

It is rather evident that even the less lenient views of the theologians, who follow St. Alphonsus, make due allowance for the possibility of brother-sister arrangements. The very example proposed by Ter Haar can serve as a guide for determining whether, in a particular case, the proximate occasion is voluntary or necessary.

Scandal

Since the factor of scandal has a bearing on the brother-sister permission, it is well to recall some of the principles relating to scandal.

Theologians generally use the classical definition and divisions of the various aspects of scandal found in St. Thomas', IIa, IIae, q. 43, articles 1-8. He defines scandal as a word or deed which is or has the appearance of evil, and which is an occasion of spiritual damage to another.

Considered actively, scandal is the placement of an act which disposes someone to spiritual ruin. It is direct, when

the incitement to sin is directly intended, either formally, with the diabolical intent of causing spiritual ruin, or materially, when the ruin is intended as a means of achieving some personal advantage or satisfaction. It is indirect, when the spiritual ruin is not primarily intended, but is foreseen as the possible result of an act which is or has the appearance of evil.

Considered passively, scandal is the spiritual damage resulting from a word or action. This effect or acceptance of scandal may result from the active scandal given, or it may simply arise from the malice or ignorance of the person scandalized. The former is pharisaical, and the latter is pusillanimous scandal.

In Article VII, St. Thomas poses the question, "Utrum bona spiritualia sint propter scandalum dimittenda?" Explaining that active scandal is always sinful if the action is *minus rectum*, he limits the discussion to passive scandal and concludes: "Et ideo quae sunt de necessitate salutis, praetermitti non debent propter scandalum vitandum."

Commenting on the same question, Merklebach [43] proposes the following rules:

> I. Ad vitandum scandalum acceptum quia datum, semper omittendum est omne opus quod active scandalizat, si sit malum. Etiam generatim omittendum est opus quod solam speciem mali habet, nisi adsit urgens et gravis ratio.
> II. Ad vitandum scandalum pusillorum; numquam debent nec possunt omitti necessaria ad salutem (susceptio Baptismi vel verae fidei), . . . quia non est licitum facere intrinsice mala ut eveniant bona.
> III. Ad vitandum scandalum pharisaicum, ordinario non sunt omittenda opera bona, quia sic daretur malis occasio malitiose impediendi bonum. . . .

We find an application of these principles in the fact that the Church, an ever relentless champion of the divine institution and sacred character of marriage, without ever departing from the doctrine of the indissolubility of the marriage bond, has

[43] *Op. cit.*, I, n. 966.

employed to the fullest extent its power over the valid ratified non-consummated marriages of the faithful, and for the good of souls and the spread of faith, over the bond of non-sacramental marriages, i.e., marriages in which at least one of the parties was not baptized.

It may help to recall that the use of the Pauline Privilege and the privileges of canon 1125 is not contingent upon the factor of scandal. The opening words of the Constitution *Populis,* mentioned in canon 1125, beautifully express the benign attitude of the Church towards converts:

> Populis ac nationibus nuper ex gentilitatis errore ad fidem catholicam conversis expedit indulgere circa libertatem contrahendi matrimonia, ne homines, continentiae servandae minime assueti, propterea minus libenter in fide persistant, et alios illorum exemplo ab eius perceptione deterreant.

This brief exposition of the principles relating to scandal is inspired by a realistic appreciation of the imperative importance of avoiding genuine scandal, the conviction that pharisaical scandal must not impede the work of saving souls, and the realization that pusillanimous scandal must be precluded or removed by instruction, lest it become an obstacle to the salvation of souls.

Competent Authority

The Ordinary of the Diocese has the right and duty to guard against scandal and to correct abuses within his diocese.[44] He has the right to determine the reparation of scandal which a public sinner must make before being admitted to Holy Communion.[45] He is the sole judge of the cessation of infamy of fact, and it is his prerogative to determine whether a person has sufficiently regained his good repute to offset the stain of infamy.[46]

[44] Canons 335, 336, 343.

[45] Canon 855.

[46] Canon 2295.

For these reasons, authors generally agree that the Ordinary is the sole competent authority to grant brother-sister permissions in cases which are both materially and formally public, i.e., not only the fact of invalidity, but also the irremovable cause of the invalidity is publicly known. Such cases, by their very nature, are reserved to the Ordinary. They also agree that if there is a reasonable doubt concerning the element of formal publicity, the case must be referred to the Ordinary. They also agree that the Ordinary can properly reserve all public cases, including those that are formally occult, to his own judgment and decision.[47]

Sullivan [48] argues that if the Ordinary does not reserve to his own judgment all public cases, then the pastor would be competent to grant a brother-sister permission in cases that are formally occult, though materially public. However, he adds, that although the pastor is not under strict obligation to do so, he would do well to consult the Ordinary even in such cases.

It is generally agreed that all public cases, whether they be both materially and formally public, or only materially public, must be handled in the external forum.

The competence of the confessor is limited strictly to cases that are certainly and entirely occult. If there is a reasonable doubt concerning the public or occult nature of the case, the confessor should not presume to exercise any authority over the case.

While the competence of the confessor in occult cases cannot be gainsaid, it is particularly true of the internal forum that the brother-sister permission is a "*res plena periculis, ideoque fere numquam permittenda*".[49] The confessor cannot excuse false charity or laxity in such matters by appealing to the dictum: "*Sacramenta propter homines*", for as Ter Haar notes:

[47] Sullivan, *op. cit.*, pp. 127-129.

[48] *Op. cit.*, p. 127.

[49] Cappello, *De Sacramentis* (ed. 4, 1939), III, n. 841, 3.

> . . . sacramenta a Christo instituta sunt propter homines, ut hi eorum susceptione a praeteritis peccatis liberentur, a futuris praevertantur et sic salventur, minime vero ut laxa eorum nimisque profusa collatione pravis moribus indulgeatur et sic homines damnentur.[50]

The confessor must be guided by the warning of St. Charles Borromeo, which has been frequently repeated by the Holy See: "*ex magna absolvendi facilitate, magnam peccandi facilitatem oriri necessario debere.*"[51] Due consideration must be given to the pre-eminence of the spiritual good of the community.[52] Since the private good of the penitent must yield to the common good, the confessor must preclude scandal and safeguard the spiritual good of the community, even in such urgent cases in which the refusal of absolution would expose the penitent to the risk of grave infamy.[53] Moreover, in dealing with penitents who repeatedly succumbed to the same proximate occasion of sin, the confessor cannot invariably extend the dictum "Poenitenti credendum est, sive pro se sive contra se loquenti" to the penitent's assurances of sufficient disposition.[54] The penitent can easily err in judging the sufficiency of his own disposition.[55] The role of a penitent is that of a witness and not of a judge. The confessor alone is the judge of the penitent's disposition. He is not bound to follow

[50] *De Occasionariis et Recidivis,* p. 413.

[51] S.C. de Prop. Fide, Instructio, Aug. 1827, *Fontes,* n. 4740; Benedictus XIV, Apostolica Constitutio, 26 iun. 1749, n. 22, *Fontes,* n. 400.

[52] Ter Haar, *op. cit.,* p. 424: "Etenim, ut aliorum sacramentorum ministri, ita confessarius ad bonum quoque publicum spectare debet."

[53] Ter Haar, *op. cit.,* p. 81: ". . . confessarius debet anteponere bonum spirituale communitatis bono privato sui poenitentis; bonum autem commune damnum pateretur, si scandalum dantes non admonerentur, et ad sacramenta admitterentur."

[54] Genicot-Salsmans, *Institutiones Theol. Moralis,* II, n. 370: "Fieri quandoque potest ut recidivo . . . confessarii prudenter iam credere nequeant, quamvis se dolere dicat."

[55] Ter Haar, *op. cit.,* p. 312: "Ipse poenitens facile falli potest circa suas dispositiones de quibus solus confessarius est judex."

the judgment of the penitent.[56] It should be remembered also, that many penitents, in their anxiety to be re-admitted to the Sacraments, make promises very freely, but after being absolved, lose some of their fervor.[57]

While the competence of the confessor in such cases cannot be questioned, he is not always in a position to ascertain all that needs to be ascertained. Frequently enough, the penitent may, in good faith, believe that the invalidity of his marriage is not publicly known; whereas, in reality, it may be a subject of current gossip which is discreetly kept from his ears. The penitent may have been responsible for the break-up of the former marriage, and the granting of such a permission to him would be regarded as the placing of a premium on his vice. The confessor may be sure of the disposition of his penitent, but he has no way of ascertaining the willingness of the other party to forego, without a struggle, all physical relations. In view of these difficulties, the confessor should be guided by the advice of eminent canonists and moralists that permission to live as brother and sister is a very dangerous thing and should practically never be granted.

Though it is well to discuss and define the limits of competent authorities in such cases, persons invalidly married normally do not seek re-admission to the Sacraments in the confessional. They sense that their situation requires attention, and assume the necessity of recourse to some high authority. Even in hospitals, when invited to make their confession, they apologize for being unable to take advantage of the invitation

[56] Ter Haar, *op. cit.*, p. 245: ". . . doctrina illa quae tenet, confessario semper poenitentis assertioni circa hujus dispositionem habendam esse fidem, nobis videtur falsa et naturae sacramenti Poenitentiae contraria, tum quia inversionem induceret ordinis iudicialis, tum etiam quia sacerdotem, Dei in hoc tribunali ministrum, gravi exponeret periculo ferendi sententiam falsam et absolvendi in terris reum, quem Deus in coelis non absolvit."

[57] Ter Haar, *Casus Conscientiae*, I, p. 59: "Multi enim poenitentes in ipso actu confessionis faciles quidem sunt in promittendo se illa media abhibituros; sed semel absoluti tardi et segnes sunt in exsequendo, quasi obliviscentes quae promiserant."

because of their bad marriage. They are generally eager to discuss their problem with anyone who might be able to help them—including relatives of Chancery officials. They submit their problem to the priest on house visitation, to the priest in the rectory or Chancery, and sometimes, they write pleading letters to the Bishop and even to the Holy Father.

For this reason, and also to insure an unvarying standard of procedure, it is recommended—without prejudice to the authority of the confessor—that such cases be reserved to the judgment and decision of the Ordinary. He is responsible for the avoidance of scandal, and he is best able to employ the various means necessary to determine the danger of scandal, the merits of the petition, and the disposition of both parties. The handling of such cases by the Ordinary emphasizes the serious consequences of the invalid marriage, and impresses upon the petitioners the gravity of their promises to observe continence.

Practical Procedure

The procedure in handling brother-sister petitions must be premised on the following considerations:

1. There can be no permission or even toleration of an occasion of sin which exposes a person to the proximate danger of losing his immortal soul. As a rule, persons who seek permission to live as brother and sister, are determined to avoid sin, and oftentimes, convince themselves by prior experience that they can observe continence. In any case, consideration should be given to the age of the parties; the condition of their health; their sincerity and extraordinary virtue, and to their experience in making a materially proximate occasion of sin formally remote.[58] Due care should be exercised in seek-

[58] Sullivan (*op. cit.*, p. 163) argues that brother-sister permissions should not be refused to a younger couple simply because they are not of an advanced age. While it is true that the age factor is not decisive, it is equally true that the age factor has a bearing on the element of scandal. The Ordinary must follow a course of action that will deter others from recklessness in

ing information on this delicate matter. The parties should not be compelled to disclose matters of conscience outside the confessional. If the parties do not volunteer any reasons for their belief that they can keep the promise, it may be advisable to direct them to convince themselves by experience that they are capable of keeping their promise to live in continence.[59]

2. The brother-sister arrangement is not an alternative, but only a last resort solution in cases in which it is evident that the proximate occasion is a necessary one. Any possibility of validation must be explored. If there is no possibility, it must be ascertained that the reasons for not separating are compelling. Authors indicate the following as typical reasons: welfare of minor children which cannot otherwise be secured; financial inability to maintain separate quarters; danger of disclosing the invalidity of a marriage that is regarded as valid; hope of eventual validation by way of a favorable decision in a matrimonial case; lingering or incurable disease of one or both parties; impossibility of obtaining a civil divorce, etc.[60] These and other reasons may serve to prove that the proximate occasion is a necessary one.

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marriage. Friends and relatives who have censured a young couple for entering a bad marriage, might well deduce that the Church is placing a premium on vice. In the case of an older couple, the same friends and relatives may be praying and pleading that the couple be given a chance to receive the Sacraments before death.

[59] Ter Haar, *ibidem:* "Si in concubinatu publico occasio est necessaria, absolutio concedenda non est, nisi, . . . b) iam per notabile tempus adhibitis remediis se a peccato continuerint." Cf. also, p. 168: "Ita S. Alphonsus: Eo casu dico omnino expedire, quod saltem differatur absolutio, donec experimento probetur continentia poenitentis."

[60] Sullivan (*op. cit.*, p. 123) observes with reference to the impossibility of obtaining a civil divorce: "Absolutely regarded, this condition is outside the pale of verification today in the United States. . . . this cause is seldom in itself sufficient in the United States." While it is true that uncontested divorces are readily granted in most of the States, it is a fact, proved by experience, that an 'innocent' and especially an aging spouse can effectively block an action for divorce.

3. Any danger of serious scandal eliminates the availability of a brother-sister permission. It should be presumed that every brother-sister case is a potential source of scandal. Unless the presumption is countervailed by contrary evidence, the permission should not be granted. The danger of scandal should not be underestimated, neither should it be exaggerated. The remarriage of a Catholic after a divorce normally is, and should be, a source of scandal. We cannot, however, ignore the fact that our society accepts divorce as a part of everyday life. In a small town or village, a divorce creates a sensation. In a large city, only a very small percentage of divorce cases rate a notice in the newspapers. Catholics involved in a divorce are inclined to conceal their divorce and remarriage. They move away from the scene of the crime and use other means to cover all traces of their past. Sometimes, even the parish priest does not suspect that his "happily married" parishioners, who are very faithful to their religious obligations, are in a bad marriage and do not receive the Sacraments. An invalid marriage is generally a matter of public record, but it may not be a matter of public knowledge. The very mention of the word "public" brings up the familiar discussion on whether the norm of canon 1037 or 2197 should be applied. Scandal arises, not from records in archives, but from the knowledge of the people. If, therefore, the fact of the invalidity is not known, and there is no danger of it being disclosed, the petition merits consideration. Often the fact of the invalidity is known, but is incorrectly ascribed to defect of canonical form. In such cases, at the reception of the Sacraments, after a brother-sister permission, the marriage would be popularly regarded as "fixed-up" and thus scandal would be avoided. In determining the danger of scandal, it is advisable to consult, not only the proper pastor, but also the pastors of the parishes where the couple lived

> at the time of the separation, divorce and remarriage. In nearly every case, there will be at least some slight danger of scandal, but this can, at times, be precluded, e.g., by directing the persons to receive the Sacraments only in churches where the status of their marriage is not known.[61]

Since the practical method of procedure in handling such cases is our primary concern, I take the liberty of submitting the method developed in the Diocese of Cleveland. This method is now generally known, and has been adopted in other dioceses. It calls for the cooperation of the parish priest, and in some cases, the Matrimonial Tribunal. The petitions are submitted to the Most Reverend Ordinary, who acts as the sole judge and authority in all such cases.

Whenever a case occurs, the parish priest requests a Brother-Sister form from the Chancery. The form is a combined questionaire and petition. It also contains instructions to the priest and the promises which are to be signed by the petitioners. The form starts with the following instructions to the priest:

> N.B. This petition may be used ONLY if (1) validation is IMPOSSIBLE, (2) separation is EXTREMELY difficult, (3) there is no danger of SCANDAL, and (4) danger of incontinency is precluded by the advanced AGE or GRAVE ILLNESS of the parties.
>
> Each petition should be accompanied by a letter commenting on the above points and presenting all the arguments in favor of as well as against the granting of the petition.

The parties are interviewed separately and alone. Identical questions are proposed to both. The questions are designed to bring out information about the past marriage and the present invalid union; about the time of residence in the locality; the reasons for not separating; the nature of their illness; the number of people, Catholic as well as non-Catholic, who are

[61] Ter Haar, *Casus Conscientiae,* Vol. I, p. 167.

aware of the invalidity of the marriage; the number of people who know that the marriage cannot be validated, and who know why it cannot be validated; the cause of the divorce and some information about the previous spouse. The answers to all the questions on the petition generally supply sufficient information on the danger of scandal and incontinency and on the reasons for not separating.

The questionnaire has proved satisfactory. The parish priests know precisely what is expected, and under what conditions a petition will be given favorable consideration. They are encouraged in their work of searching out the sheep that strayed from the fold. They know when they can extend a reasonable hope for a favorable decision, without repeated consultation with the Bishop's Office.

The problem of handling the petitions of those who have hopes of validating their marriage by way of a Pauline or Petrine Privilege, requires additional precautions. Generally, such petitioners are neither advanced in years, nor suffer from any grave illness. Sometimes their hopes for a favorable decision from the Tribunal are premature and groundless. Their attempted marriage argues against their ability to control the passions which led them to risk the salvation of their souls in an invalid marriage. In order to obtain added assurances of their sincerity and of the reasonableness of their hopes for a favorable decision, their petitions must carry the endorsement of the Matrimonial Tribunal.

In this type of case, the parish priest inquires into the possibility of a Pauline or Petrine Privilege. He encourages the non-Catholic to take instructions in the faith and insists that the Catholic party attend the same instructions. In the course of instructions, the priest lays particular stress on the necessity of avoiding sin. When the instructions are nearly completed, and the priest is convinced of the sincere desire for conversion, the case is referred to the Matrimonial Tribunal. The Tribunal will pay particular attention to the sincerity of the

parties and their willingnes to live in accordance with the laws of God. The Tribunal will then recommend a petition for permission to live as brother and sister. The permission, in such cases, is granted only on a temporary basis, i.e., until a final decision is made in the case.

When all requisite information has been obtained, each party, in the presence of the other and that of the priest, makes the following promises under oath:

> Realizing fully the sacredness of an oath, and my obligation before God, touching the Holy Gospels, I solemnly swear:
>
> 1. that under no circumstance will I ever attempt to live as husband and wife with my present consort.
> 2. that if I violate this promise, I will not attempt to receive the Sacraments until I have separated, or referred the matter to the Bishop.
> 3. that I will receive the Sacrament of Communion only in churches where my marital status is not known to the parishioners.
> 4. that I will explain my status to my confessor, and will report to him at least four times a year on the observance of my promise.
> 5. that I will take all precaution to preclude scandal from the use of the privilege for which I petition.
>
> So help me God and these Holy Gospels.

The petition is then submitted to the Most Reverend Bishop, together with a letter from the parish priest, and in Tribunal cases, from the *Officialis*. If further information is required, the petitioners are summoned, through the parish priest, to the Chancery. If necesary, the pastors of the parishes in which the parties lived at the time of their divorce and remarriage are contacted. When the information is complete and the arguments in favor of granting the permission are conclusive, the Ordinary grants the request by signing his name to the petition. The petition, together with all related correspondence and documents, is filed in the Chancery Archives.

A notice of the grant is mailed to the parish priest, together

with a copy of the promises. The priest informs the couple and relays any particular instructions that may be given.

This method of procedure is proposed, not as a perfect model, but as a practical approach which has proved satisfactory. Due precaution is being constantly taken to prevent the granting of such permission from becoming common knowledge. It is quite evident, from the circumstances of the cases presented, that people are not aware of the brother-sister solution. Most of the petitioners would have qualified for such permission long before its availability was suggested by a parish priest or a hospital chaplain.

Summary

While we have discussed, in some detail, the principles and considerations relating to the brother-sister arrangement, the entire discussion can be reduced to the following statements:

1) Permissible cohabitation in invalid marriages is available only if validation is impossible; compelling grave reasons for not separating are present, and there is no danger of incontinence or scandal.
2) All public cases, whether they be both materially and formally public, or only materially public, should be handled in the external forum.
3) The competence of the confessor is limited strictly to cases that are certainly and completely occult, and he should be guided by the advice of eminent canonists and moralists, that permission to live as brother and sister is a very dangerous thing and should practically never be granted.
4) The Ordinary has the right and duty to judge all cases that are both materially and formally public; however, for the sake of control and uniform handling, it is advisable that all public cases be reserved to his judgment and decision.

Conclusion

The brother-sister arrangement affords the Chancery Official and specialist in canon law an opportunity to share the holy anxiety which parish priests show for the sheep outside the

fold who have never had, or have lost the faith, and also for the sheep within the fold who, as victims of sin, are deprived of unity in grace. The increased frequency of petitions of persons invalidly married for permission to live as brother and sister reflects not only increased rate of divorces in our society, but also the zeal of the parish priests who pursue the strays with the determination to use, without compromising principles, every available means to lead all souls to the unity of faith and grace. The parish priests are eager to restore the life of grace to all souls at the earliest possible moment, rather than to delay such restoration until the moment of death. With the aid and guidance of canon law, we can assist in the pastoral work of helping men to secure possession of the truth and grace of Christ, and to live, grow and die in holiness, piety and fidelity to the Faith.

THE CONSTITUTIONS OF RELIGIOUS INSTITUTES AND MODERN TRENDS*

Part II**—Approval of Constitutions

CANON Law and all other pontifical laws stand at the top of the juridical norms that bind religious. As Escudero says, all pontifical laws have the binding force of precepts of the Church; all of them bind in conscience, and it is a sin to transgress any of them.[88] The Constitutions are next in juridical importance in the religious life. The Constitutions have a stability and firmness corresponding to the pontifical approval given them.[89]

The ancient practice of the Holy See in the approval of the "*Institutum*" (sometimes called "*Formula*"), which means a statement of the fundamental ideas that distinguish an Institute from all others, was to give at the same time authorization to write the appropriate Constitutions or more detailed norms in order to make practical and workable the fixed principles or ideas approved by papal Bull or Brief. These faculties were granted with one or another of the following clauses: 1) that the Constitutions, once prepared, would go immediately into effect, and were, so to speak, confirmed even before their drafting; or 2) that the Constitutions had to be submitted to the Holy See for their approval. All ancient Institutes enjoyed these faculties, whether expressly contained or not in the Bull or Brief of approval, because Constitutions

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88 *Normas del Derecho Religioso* in *Vida Religiosa*, V (1949) 88.

89 Maroto, *op. cit.*, p. 49.

were considered always to be part of their legislative powers.[90] The Apostolic Letter addressed to the Theatines (Order of Clerics Regular) by Clement VII on June 24, 1524, is rather explicit on this point.[91] The tendency was that Constitutions of Institutes without a Rule would become more permanent, more important, and more identified with the "*Institutum*" or "*Formula.*" Finally they were reserved to the Holy See. At the beginning of the sixteenth century, it became customary to have the Constitutions approved by the Roman Pontiff. Consequently it was a common thing that Constitutions, with some exceptions only, were approved and confirmed by the Holy See.[92] From the beginning of the nineteenth century, the Sacred Congregation of Bishops and Regulars adopted the policy of asking for a copy of the Constitutions of every new Institute, which, at an opportune time, were sooner or later also approved by the Holy See.[93] Even in the case of Constitutions which did not have to be submitted to the Holy See, which, therefore, were more easily changed at one or another time, experience and customs began to prove rather powerfully that a decision to make them fixed, constitutive and more complete, would be very wise. Some Institutes with "free" Constitutions (as Larraona calls them) finally found it more practical and prudent to sacrifice some of the juridical autonomy they enjoyed by spontaneously submitting their Constitutions for the approval of the Holy See in order to gain thereby a much needed unity of government and peace in the Institute. With the exception of five or six of the older Institutes, all have submitted their Constiutions to the Holy See for approval and have thereby consented to some curtailment of their powers over the Constitutions. Over these Constitutions the Holy See has some authority, although not as much as it assumes to have over modern Constitutions; with them the

[90] Cf. Larraona, *op. cit.*, p. 142.

[91] Cf., Maroto, *op. cit.*, p. 78.

[92] Maroto, *op. cit.*, p. 50.

[93] Maroto, *op. cit.*, p. 52.

Holy See will claim authority only over the more basic points.[94] As a historical note, it may be added that the decree of the Sacred Congregation of Religious issued on October 26, 1921, ordering the revision of Rules and Constitutions, applied only to those already approved by the Holy See. Constitutions which had never been submitted to the Holy See and had, therefore, never been approved by it, were not subject to the decree.[95] At present there is an absolute law for modern Institutes that obliges them to submit their Constitutions for the approval of the Holy See.[96] Although there is no general rule commanding that Constitutions should be approved by the Holy See, the obligation was introduced by the style, and later by the decrees of the Roman Curia, as early as the beginning of last century.[97]

The approval given to Constitutions by the Holy See must be presumed capable of producing some new effect; Constitutions must obtain thereby some new juridical or moral aspect or both. Goyeneche states that by the approval of the Holy See Constitutions become pontifical law.[98] However, Tabera affirms that pontifical approval does not make Constitutions a pontifical law properly so-called.[99] This difference of opinion can be reconciled by taking into consideration what Maroto wrote in 1920: Rules and Constitutions approved by the Holy See, at least *in forma communi,* are to be considered like(*ad instar*) special pontifical laws. This means that although properly speaking Constitutions approved by the Holy See *in forma communi* are not really pontifical laws, as Tabera says; yet, they are for many purposes like pontifical laws, which seems to be Goyeneche's opinion.

[94] Cf. Larraona, *op. cit.,* p. 144-145.

[95] Maroto, *op. cit.,* p. 52.

[96] Larraona, *op. cit.,* p. 144.

[97] Cf. Larraona, *CpR.,* IV (1923), p. 137, note 384.

[98] *CpR.,* III (1922), 55; *Quaestiones Canonicae de Iure Religiosorum* (Naples, 1954) I, 323.

[99] *Op. cit.,* p. 31.

Canonists do not often clearly explain what is the peculiar obligation produced by the fact that Constitutions have been approved by the Holy See. Maroto says that if one is to affirm that the approval of the Holy See is not entirely useless, it is necessary to recognize a greater binding force of the Constitutions which have been approved.[100] This opinion apparently demands that the approval of the Holy See must be considered as adding something to the juridical or moral nature of Constitutions. It would not be sufficient to simply affirm that the approval of the Constitutions guarantees that they contain nothing contrary to the true concept of Christian perfection. Maroto is not very specific on this point. He only says that generally it can be affirmed that once the Constitutions have been approved, they obtain full force and deserve all reverence and observance. Yet they do not obtain the greater binding force which belongs exclusively to the ancient Rules.[101]

In recent times, beginning about the middle of the nineteenth century, the approval of Institutes of Simple Vows and of their Constitutions is officially done through decrees issued by the Sacred Congregation of Religious, without the Holy Father taking action personally; no Apostolic Letters, as in the past, are generally issued on these matters.[102] However, nothing forbids religious from trying to obtain the Pope's personal approval in the form of confirmation by an Apostolic Letter. The Congregation of Missionary Sons of the Immaculate Heart of Mary (Claretians) founded by St. Anthony Claret on July 16, 1849, obtained the decree of praise on November 21, 1860; the decree of temporary approval of the Constitutions for a period of ten years on January 27, 1866; the decree of definitive approval of the Constitutions on May 2, 1870; and on May 13, 1924 the decree of approval of the Constitutions adapted to the new Code of Canon Law. Finally, by the Apostolic Letter *Inter Religiosas Familias* in the form

[100] *Op. cit.*, p. 53.

[101] *Op. cit.*, p. 53.

[102] Maroto, *op. cit.*, p. 94.

of a Brief, signed July 16, 1924, Pope Pius XI gave the most solemn approval to the Institute and its Constitutions: "Therefore, . . . of Our own accord, freely and after mature deliberation, using the fulness of Our Apostolic power, . . . We most fully approve in perpetuity the Congregation . . . and We give to its Constitutions the supreme strength and force of the Apostolic sanction." [103]

Constitutions, after they have been approved by the competent authority, are true ecclesiastical laws. In the case of exempt clerical religious, Constitutions receive the character of ecclesiastical laws from the General Chapter which is their legislative authority, except in the Society of Jesus, where the legislative powers are vested in the Superior General. The approval of the Holy See in such cases is not constitutive; it is only recognition and confirmation. For other Institutes, if of pontifical right it is the Roman Pontiff, if of diocesan right it is the local Ordinary who makes Constitutions ecclesiastical laws. In both cases the act of the ecclesiastical superiors, the Pope and the Bishop respectively, is constitutive; it gives the Constitutions the force of law.[104] As indicated above, Constitutions, whether they belong to an order or to a congregation of pontifical right, could receive the approval *in forma communi* or *in forma specifica.* Generally it is given *in forma communi,* and in case of doubt whether it be one or the other form, it is presumed to be *in forma communi.*[105] According to the traditional teaching of canonists, the following are the signs which indicate that the confirmation was given *in forma specifica:* 1) When the text of the document confirmed is incorporated in its entirety in the decree of confirmation; 2) when the clause "with full knowledge" or "after mature deliberation" is used in the confirmation; 3) when a clause in-

[103] *AAS.,* XVI (1924), 354.

[104] *Dictionnaire de Droit Canonique,* IV (Paris, 1949), s.v. *Constitutions des Religieux,* p. 465, column 1.

[105] Michiels, *Normae Generales Juris Canonici* (Desclee, 1949), II, 536.

dicating the use of the plentitude of the Pope's power is introduced.[106]

The approval given *in forma communi* does not change the nature of the Constitutions. Besides, this type of confirmation is conditional; that is, it supposes the Constitutions to be entirely in conformity with the common law, and does not replace the common law by the norms of the Constitutions where conformity is lacking.

Approval given *in forma specifica* grants to the text either the force of a pontifical particular law, which therefore could be contrary to the common law, or, as is more often the case, it grants the Constitutions the force of privilege, beyond or against the common law. In these cases the Holy See does not generally intend thereby to make the Constitutions true pontifical laws binding under sin.[107] Wagner states that confirmation *in forma specifica* gives the Constitutions the force which a law of the Roman Pontiff would have.[108] By this he intends to say more than is apparent. Following the opinion of Montalvus, Wagner affirms that specific confirmation does not make a law pontifical; it only gives it the force of papal laws.[109] This he maintains against Maroto, Goyeneche, and Schaefer, who call Constitutions approved *in forma specifica* pontifical laws.[110] Wagner draws a further conclusion from his premise. The fact that Constitutions approved by the Holy See cannot be changed without its authorization does not follow, he says, as an effect of specific confirmation, or because they are pontifical laws; it is only due to the fact that a dis-

[106] Cf. Michiels, *op. cit.*, p. 536; Schmalzgrueber, *Ius Ecclesiasticum Universum,* (Rome, 1844), vol. II, part II, p. 551; Wagner, *De Legibus Constitutionum Generalium O.F.M.* in *Antonianum* XXIII (1948), 263.

[107] *Dictionnaire de Droit Canonique,* vol. IV, s.v. *Constitutions,* p. 466, column 2; cf. Wernz-Vidal, *Jus Canonicum,* III, 50.

[108] *De Legibus* in *Antonianum,* p. 264.

[109] *Ibid.,* p. 265.

[110] Cf. *CpR.,* IV (1923), 81 and VI (1925) 267; Goyeneche, *op. cit.,* I, 89; Schaefer, *op. cit.,* p. 216, n. 464.

position was enacted by the Holy See to that effect.[111] This, he adds, is against the opinion of Larraona.[112] It is possible that the Holy Father's statement in the Allocution to the Jesuits regarding points in their Constitutions approved *in forma specifica* [113] might be interpreted to support Larraona's opinion. In that case, Wagner might have to reconsider his statement.

Obligation to Keep the Constitutions

Before the nature of the obligation of religious to keep their Constitutions is discussed, it is necessary to clarify the source of that obligation. Actually the origin of an obligation serves to determine the type of obligation imposed. Gambari is of the opinion that canon 593, which states that " each and every religious . . . is bound . . . to order his life according to the Rules and Constitutions of his Institute," should be interpreted to imply some obligation in conscience.[114] If the obligation in conscience is understood to be imposed by the canon, the canon is the source of the obligation. That seems to follow from Gambari's statement. Yet, the common opinion is that the canon does not impose a new obligation.[115] Some canonists are even more specific and point out the authentic source of the obligation, which is " by reason of the state which a religious embraces ".[116] Vermeersch says only that the obligation to keep the rules is prudently worded by the canon so as to require that one's life be molded according to the rules, rather than to demand directly that the rules be observed.[117] Peinador states that according to canon 593 there is a canonical

[111] *Ibidem,* p. 266.

[112] Cf. *CpR.,* IV (1923) 138, note 384.

[113] *AAS.,* XLIX (1957) 811.

[114] *Renovation of Constitutions* in *Acta et Documenta,* I, 526.

[115] Bouscaren-Ellis, *Canon Law,* (Milwaukee, 1953) p. 285; Wernz-Vidal, *De Religiosis* (Rome, 1933) p. 374.

[116] Cappello, *op. cit.,* II, 73; Schaefer, *op. cit.,* p. 669.

[117] *Epitome,* (Dessain, 1937), I, 547.

obligation to faithfully keep all the prescriptions of the Constitutions, but only because they are the rule.[118] Here the term " canonical " might be misleading, for some could be inclined to interpret it as to imply an obligation arising from the canon. Peinador uses the term " canonical," as explained above, to distinguish this kind of obligation from moral and ascetical obligations. In his opinion, Constitutions oblige because they are the rule of life embraced by the religious.

One may also inquire about the moral obligation there is to keep the Constitutions. This is a very pertinent question for people especially dedicated to do God's will in everything, to follow God's call, their vocation. According to Gambari, the moral obligation there is to keep the Constitutions has never been defined in general by the Church.[119] But sufficient information was never lacking on this point. A religious, according to the common doctrine of the Church, is seriously bound to tend to perfection. This is the primary duty of all those who profess the evangelical counsels, an obligation proper to the religious state.[120] Theologians rightly place together the obligation to tend to perfection and the obligation to keep the Constitutions.[121] Sanchez affirms that the obligation to tend to perfection is identical with the obligation to keep the Constitutions.[122]

The Constitutions point out to the religious the road he is to follow and the norms to which he must conform his life; they give him the means he must use in order to obtain the sanctity and perfection proper to his state. Therefore, a religious must

[118] *Deber Canonico* in *Vida Relig.*, V (1948) 23.

[119] *Ibidem*, p. 525.

[120] Cf. St. Thomas, 2, 2, q. 184, a. 5; q. 186, a. 2.

[121] Cf. Azor, *Institutiones Morales* (Rome, 1600), pars I, l. 11, c. 22, quaer. 11, 1, p. 147; Pellizzario, *Manuale Regularium* (Lugduni, 1653), tract. 3, c. 3, sect. 2, n. 45, t. 1, p. 230; De Valencia, *Commentaria Theologica in Secundam Secundae*, (Lugduni, 1609), disp. 10, q. 4, punct. 4-5, 3, pp. 1748-1754; Suarez, *De Statu Religionis*, (Paris, 1866), tract. 8, l. 1, c. 4, 16, pp. 17-28.

[122] *Opus Morale in Praecepta Decalogi*, (Lugduni, 1621), l. 4, c. 5, nn. 4-5, 2, pp. 91-92.

begin by having great esteem for his Constitutions. If he despises them, he sins mortally; because the contempt of the Constitutions implies the contempt of perfection. St. Thomas proves this when he says that "contempt of the rule . . . is directly contrary to the profession whereby a man vows to live according to the rule".[123] Beyond this the Constitutions have another important mission to fulfill. Perfection consists in charity. "As regards the practice of perfection, a man is required to remove from himself whatever may hinder his affections from tending wholly to God, for it is in this that the perfection of charity consists."[124] Such hindrances are the attachments to external goods, the concupiscence of sensible pleasures, and the inordination of the human will. A religious protects himself against them by the three vows. As the vows are the protection and defense of charity, so the Constitutions are the protection and defense of the vows. Constitutions regard principally the things of the vows; they make easier their observance, and free the religious from the dangers to which he would be exposed outside a well-regulated life. St. Thomas put it this way: "Now the vow of profession regards chiefly the three things aforesaid, namely poverty, continence, and obedience, while all others (constitutions and disciplinary norms) are directed to these (the vows)."[125] Consequently a religious must keep the Constitutions inasmuch as they help and lead him to the observance of the vows. This is the second obligation that arises from the Constitutions; an obligation which is greater the greater is the relation between the prescriptions of the Constitutions and the vows. A transgression of the Constitutions is more serious the greater is the danger to which it exposes the religious to the violation of the vows.

Besides these two kinds of obligation, there is a third one which can be called the proper and specific obligation of Con-

[123] 2, 2, q. 186, a. 9.

[124] 2, 2, q. 186, a. 7.

[125] 2, 2, q. 186, a. 9.

stitutions as such. This obligation, like any other obligation, is based on man's relationship to his final end, or on the necessary conformity of man's will to the will of God.[126]

The moral bond that binds the human will is imposed through the intellect which is capable of knowing God's will, the need to embrace it, and the existing relationship between the means and the end. Once the intellect is in possession of this knowledge, it formulates a practical judgment that is announced with the words " I must." From this moment on the will, with its freedom physically intact, is morally bound. The binding force will be greater as the relation is greater existing between the means and the end, or when the will of God is more absolute or demanding.

Some means are absolutely necessary for the attainment of the final end. The obligation to use them is serious, and the law that prescribes them binds under mortal sin. Other means, without being absolutely necessary for the attainment of the final end, lead to it in such a way that to ignore them causes a delay on the way and retards its attainment. The obligation to use these means is light, and the law that prescribes them binds under venial sin only. Then there is a third class of means which are neither absolutely necessary for the end, nor will their omission or abuse cause a deviation from the last end. But they are of such a nature as to be the most apt, the ones that better and more directly lead to man's end. These means are not imposed under a serious or a light obligation, neither under mortal nor venial sin. Yet, their esteem or contempt, their use or non-use is not entirely indifferent. Conscience tells man that he *must* use those means.[127]

This is the case of the Constitutions. They show God's will; they are the concrete and definite application of the evangelical counsels embraced by religious profession. As a mat-

[126] Mazon, *Las Reglas de los Religiosos* (Gregorian University, Rome, 1940) p. 333.

[127] Mazon, *op. cit.*, 334.

ter of fact, the Constitutions not only point out what is better and more perfect for a religious to do every moment of his life; actually the Constitutions *make* what they prescribe the better thing for him, the more conducive means to the end.[128] A religious confronted with the prescriptions of the Constitutions cannot consider himself entirely free to follow or not to follow them. There is a moral obligation which binds under *positive imperfection.*[129]

Some claim that positive imperfection cannot exist without venial sin. This matter has been studied and sufficiently explained more than 80 times in books and periodicals.[130] In these references the reader will find an accurate explanation of positive imperfection and of how it does not necessarily imply venial sin.

Some might object to the term "obligation" used here in reference to the Constitutions, on the grounds that generally the term is taken in the more strict sense to indicate whatever binds under sin. Evidently, the obligation arising from the Constitutions is not a strict obligation in that sense. But one can say here what St. Thomas said of venial sin, which only analogically is a sin if compared with mortal sin.[131] The obligation arising from the Constituttions only analogically can be said to be like the obligation arising from moral laws, just as the likeness between positive imperfection and sin is only analogical.[132] Positive imperfection disposes to venial sin, as venial sin disposes to mortal sin.[133]

[128] Mazon, *op. cit.*, p. 335.

[129] Gutierrez, *op. cit.*, p. 264; Mazon, *op. cit.*, p. 335.

[130] Cf. Huerth, *De Imperfectione Positiva in Gregorianum*, V (1924), 102-106; Cathrein, *Unvolkommenheit und lässliche Sünde* in *Zeitschrift für Aszese und Mystik*, III (1928) 115-137; Ranwez, *Péché Véniel et Imperfection* in *Ephemerides Theologicae Lovanienses*, V (1928) 32-49, and in *Nouvelle Revue Theologique*, LVIII (1931) 114-135; Aertnys-Damen, *Theologia Moralis* (Marietti, 1950) I, 201, n. 233 bis.

[131] 1, 2, q. 88, a. 1.

[132] Mazon, *op. cit.*, p. 338.

[133] Aertnys-Damen, *l.c.*

A Greater Obligation

Aside from whatever might be the nature of the obligation to keep the Constitutions, there are two practical remarks which can help in the over-all interpretation of the Constitutions. Being different from ordinary laws, the Constitutions have for their end the perfection of Christian life. Therefore, they can be more demanding than ordinary laws. Hence, in case of doubt, they more easily retain their binding force, for religious have, in virtue of their profession, renounced natural liberty and have assumed new positive obligations.[134] On the other hand, a religious is not bound to do *every moment* what is more perfect or of counsel only. At times it will be necessary or at least convenient to be satisfied with what is strictly theologically or canonically obligatory, forgetting what is of counsel and of greater perfection. This norm applies both in one's own government, and more so in the government of others. It is therefore clear that besides the spiritual director, one needs the theologian and the canonist.[135]

A closer study of the judicial, moral, and ascetical aspect of the Constitutions reveals a new force and power which exists in the religious state. A legislator may seek to bind his subjects either by relying on their rectitude, binding their conscience, or by adding to this obligation in conscience the fear of punishment when it does not seem sufficient to rely only on the rectitude of their conscience, or finally by using only the motive of the fear of punishment when it is sufficient to obtain the end intended by the legislator. There would be respectively a moral law, a moral law with sanction, and a merely penal law.

The lawgiver of religious communities can count on another factor to make the subjects observe the law without having any recourse to a strictly so-called obligation in conscience or to punishment. Such a factor is not available to civil authorities, unless the religious element is added as something acci-

[134] *Dictionnaire de Droit Canonique*, IV, s.v. *Constitutions*, p. 470, column 1.

[135] Peinador, *Deber Canonico* in *Vida Relig.*, V (1948), 23.

dental to it. This factor is the love of perfection. As it moved a man to give up the world and to embrace the state of the religious life, so it is now expected to move him to the faithful observance of all the obligations of his state. Founders generally appeal to this motive when asking their followers to observe their Constitutions.[136]

The Franciscan Wagner wrote: "The charismatic perfection of St. Francis remains the highest ideal for the personality and zeal of each Friar Minor; but it should not be codified." [137] As a matter of fact, it would not be possible to codify the perfection of any saint. Men do not live for the law, but the law must help men to live a better life. Constitutions help religious to live a better life because they are a practical summary of the evangelical counsels and a résumé of the best among the teachings of Christ.[138] The rules proper to each Institute contain an authentic interpretation of the extent of the vows and the manner in which they must be observed; for a religious makes his vows according to his Constitutions.[139] The Constitutions teach and clearly define the spirit of the Institute, the kind of perfection proper to it and in conformity with its particular end, the virtues more necessary for its members and more in keeping with its spirit.

The text of the Constitutions should be as complete as possible, not only concerning canonical matters, but also regarding the special training of the members of the Institute, their apostolic works, their spiritual and religious life, and also about the spirit proper to the Institute.[140] The Constitutions supplement the general laws of the Church and specify certain principles of spirituality according to the end proper to each Institute, the nature of the members, and the inspirations of

[136] Mazon, *op. cit.*, p. 311.

[137] *Historia Constitutionum*, p. 165.

[138] Choupin, *Nature et obligations de l'Etat Religieux*, (Paris, 1922), p. 352.

[139] Cf. canon 593.

[140] Muzzarelli, *Renovation of the Constitutions* in *Acta et Documenta*, I, 543.

the Holy Spirit granted to the founder and approved by the Church. In the Constitutions a religious finds the means best adapted to the kind of perfection God expects of him.[141] All this is guaranteed by the approval of the Constitutions by the Holy See. For it is the exclusive right of the *Magisterium* of the Church to declare the genuine concept of Christian perfection, and to define the relative value and efficacy of the various means adopted to acquire it.[142]

The Constitutions are for the religious and for the Church an incomparable guarantee of vitality.[143] A religious will have, according to Chartreux, the force and virtue of his vocation only in the measure in which he adapts himself to the prescriptions of the Constitutions. Religious formed in conformity to their Constitutions are a divine masterpiece . . . and have an incomparable power for action.[144]

The great juridical problem about the Constitutions revolves around the obligation to observe them.[145] Gambari says that some Rules and Constitutions oblige under sin, like the Carmelite Rule.[146] According to the official text, this Rule binds under venial sin; the Constitutions do not bind under sin, but bind one to accept the sanction.[147] No Constitutions are quoted anywhere that bind under sin. Lately the Constitutions of St. Paul's Society (Compagnia di S. Paolo) have been approved with a clause stating that they oblige under positive imperfection.[148]

If it is true that the Church has never defined the moral obligation of the Constitutions, it did not remain entirely

[141] Jombart, *Renovation of the common and particular elements of the States of Perfection* in *Acta et Documenta*, II, 27.

[142] Creusen, *Renovation of the Constitutions* in *Acta et Documenta*, II, 252.

[143] Chartreux, *La Vie Contemplative*, quoted by Choupin, *op. cit.* p. 355.

[144] *La Vie Contemplative*, quoted by Choupin, *op. cit.*, p. 358.

[145] Mazon, *op. cit.*, p. 309.

[146] *Ibidem*, p. 526.

[147] *Regula et Constitutiones Fratrum Discalcatorum*, (Rome, 1940) n. 4.

[148] Gambari, *ibidem*, p. 526.

silent on the matter. The *Normae* published on July 29, 1901, by the Sacred Congregation of Bishops and Regulars as directives to be followed in the preparation of Constitutions of Institutues of simple vows prescribe that the Constitutions should state that of themselves they do not bind under sin; but that no religious could be excused from sin whenever he transgresses the Constitutions out of contempt or in matters contrary to the vows and the precepts of God and of the Church.[149] This general declaration of the mind of the Church, according to Mazon, plainly shows the moral nature of Constitutions.[150] However, it might be noticed that the text of the *Normae* published by the Sacred Congregation of Religious in 1922 is much shorter; it contains only 28 numbers. The entire second section of the original *Normae* was dropped as unnecessary.[151] Writers or editors of new Constitutions are referred concerning the contents of the second section of the original *Normae* to the Code of Canon Law and to approved commentaries on the law for religious published after 1901.[152] The main reason for the omission of a detailed form of Constitutions in these *Normae* was that the Sacred Congregation of Religious wanted to allow greater freedom in the drafting of new Constitutions. The Sacred Congregation purposely avoided authoritatively proposing a text of Constitutions as a model to be copied by all, with the undesirable result that Constitutions would be rather abstract and less adapted to the special end, mind, spirit and character of each Institute.[153] However, the *Normae* issued under the name of the Sacred Congregation for the Propagation of the Faith in 1940, are somewhat longer than the *Normae* of 1922, although shorter than those of 1901. They contain 195 numbers, divided into

[149] N. 320.

[150] *Op. cit.*, preface.

[151] *Normae secundum quas S. C. de Religiosis in Novis Religiosis Congregationibus Approbandis Procedere Solet* (Rome, 1922) p. 5, n. 1.

[152] *Normae, l. c.*

[153] Larraona, *CpR.*, XIV (1933), 66-67.

two parts. Number 192 in Chapter XXV copies the contents of canon 593. Number 193 reads as follows: "As the constitutions must be observed not through fear, but out of love, of themselves they do not oblige under sin, except in matters touching the religious vows, divine precepts or ecclesiastical laws, or when the constitutions expressly state differently. However, religious are not free from sin when they transgress the constitutions through contempt or some other inordinate affection, or with scandal." Number 194 supplements the two preceding ones with the following norms: "Superiors must warn, correct and even punish those who transgress the prescriptions of the constitutions, and the transgressors must accept the corrections and penances with humility."

Escudero sums up the teachings on the obligation of the Constitutions as follows: "In theory, it is the common opinion of theologians and canonists that the constitutions do not bind under sin. In practice, it will be hard to fail to keep the constitutions without committing a sin through the wrong motivation or circumstances which make the act evil. In any case, the prescriptions of the constitutions are not mere counsels that may be accepted or rejected at will, as canon 593 implies."[154]

This summary has much practical value, but is not sufficiently complete for one investigating the juridical nature of the Constitutions. In the study of the nature of the obligation of the Constitutions, one must abstract from the circumstances which surround the concrete action, and must attend only to the proper and specific obligation that arises from the Constitutions as such. Wernz advises on this point that it is easy to accept the fact that all orders and exempt congregations of men have a legislative power capable of creating true laws, and that general precepts issued by the superiors of women religious and of men not exempt may be raised to the category of true laws by the approval of the competent ec-

[154] *Normas del Derecho Religioso* in *Vida Relig.*, VI (1949) 144.

clesiastical superior.[155] Yet, to insist that Constitutions are true laws and therefore have a higher juridical rank does not add any greater dignity to the Constitutions, but on the contrary may lower them when the result is just to make the Constitutions merely penal laws.[156] Furthermore, regarding the Constitutions in which no mention is made of the obligation to bind under sin, but which expressly bind to the sanction, it is Mazon's opinion that they do not bind in conscience of themselves either to the observance of the prescription or to the fulfillment of the sanction or penalty.[157] When the Constitutions say nothing about punishment or sanction but expressly state that they do not bind under sin, they should be interpreted, and this for a greater reason than in the case of Constitutions binding to the penalty, not to bind in conscience either to keep the Constitutions or to accept the punishment.[158]

Spiritual Efficacy of Constitutions

All founders, theologians, canonists, and the religious themselves acknowledge that the Constitutions create some obligation. There is an essential difference between pure counsels and the prescriptions of the Constitutions, although it is not difficult to find some points of contact and similarity between them. For one thing a counsel does not change the nature of the means it recommends to be used. The Constitutions, on the other hand, in a manner analagous to constitutive blessings, make the things they prescribe the best and most apt means for the attainment of one's final end.[159] There is not yet an adequate terminology to call the Constitutions by their

[155] *Jus Decretalium,* (Prati, 1913) n. 94.

[156] Mazon, *op. cit.,* p. 313; cf. Sinthern, *Welche Verpflichtung legen die Ordensregeln auf* in *Zeitschrift für Aszese und Mystik,* I (1926) 266-282, where he points out the conclusions entirely alien to the nature of the religious state which follow from the thesis that affirms that constitutions are penal laws.

[157] *Op. cit.,* p. 309.

[158] Mazon, *op. cit.,* p. 310.

[159] Mazon, *op. cit.,* p. 343.

proper juridical name. But since juridically speaking they are closer to the nature of law than to the nature of counsels, the Constitutions may be considered as laws in the broad sense.

The clear statement that the Constitutions do not bind under sin must be accompanied by a statement likewise clear that the constitutions are for religious an indispensable ascetical means to perfection. St. Pius X, speaking about seminarians, said that he who frets under discipline and keeps the rules only out of servile fear and not through conviction of his conscience, is far removed from the hope of a holy priestly life.[160]

Religious life is the classic state of the evangelical counsels, a state freely chosen, and consequently a way and state of life originally built on generosity. He who categorically contradicts with his lack of discipline this innate tendency of one called to the life of the counsels shows in fact that he has no vocation. The Constitutions are not only a form of general and common practice of mortification and generosity. They contain and produce a specific ascetical physiognomy that accurately expresses the concrete spirit of an Institute. It would be difficult to find a more powerful, stable, and humble practice of self-control than the wilful and joyful observance of the Constitutions. It is a powerful practice because it asks for the perfect fulfillment of all duties; it is stable for it covers every hour of the day, every day of the life of a religious; it is humble because, without being lowly, the observance of the Constitutions leaves no room for the empty vanity that could be the result of fasts and sporadic penances of one's choice.[161]

But the Constitutions have even more than that to offer. The highest sanctity consists in trustful abandonment to the divine will, in following every moment God's plan for us in every event. The gift of grace which God has hidden in the present moment is discovered and made his own by a religious in obedience to the Constitutions, provided they are inter-

[160] Motu Proprio, *Sacrorum Antistitum*, October 1, 1910.

[161] Cf. Ferrari, *op. cit.*, p. 236.

preted as a spiritual self-donation to the will of the superiors who authentically interpret the will of God. Such practice will infallibly produce the following effects: a rapid strengthening of one's life of piety, security and stability in one's vocation, because a vocation is best nourished by practical generosity, and a constant widening horizon of the divine desires and designs over us.

Spiritual directors must try to make the faithful observance of the Constitutions an essential component of the ascetical life. It is possible that religious do not exploit well enough the Constitutions as a means of spiritual direction. Rules must be reasonable and reasonably applied; but they must also be made to be observed as a precious answer to the divine will calling a religious to the life of the evangelical counsels. One is not a better superior, as a religious or as a leader, precisely because he keeps the letter of the Constitutions most strictly. He is the better superior who succeeds in entering into the deepest intention of the one who made the law. He is the better superior who with greater skill, equity or gentleness, and rational indulgence applies the rule with understanding, giving life to what the letter of the law in its materiality is inadequate to express: the true will of the prudent legislator. A good superior takes into consideration human frailty, and though he remains inflexible in the pursuit of the end proper to the religious life (regular observance, practice of the vows, personal sanctification), he allows kindness, understanding, and the greatest possible flexibility in the use of the means imposed by the law.[162]

According to present Church law there cannot be a religious community without common life,[163] nor common life without Constitutions.[164] The Constitutions are the supreme authority in the Institute over the superiors as well as over the sub-

[162] A. Peinador, *Personal Initiative and Obedience* in *Vida Relig.*, XIII (1956) 216.

[163] Cf. canon 594; Gutierrez, *op. cit.*, I, 289.

[164] Choupin, *op. cit.*, p. 352.

jects. Once the Constitutions have been approved by the Holy See, all are bound to keep them. As Gambari says, according to the present practice, it is the Church that gives the Constitutions to the Institutes.[165] The Constitutions are for the Institute a guarantee of unity in its spirit and of right trends and practices. This unity communicates to the Institute and preserves its characteristics in spite of the changes brought about by the vicissitudes of time and the succession of several superiors.[166]

The Constitutions bring many benefits to the superiors. First, the rules mark the extent and the limitations of their powers and of the commands they give. A superior may not order what is beyond the Constitutions nor demand a perfection which is greater than the perfection professed in his Institute. He cannot command what is vain and ridiculous, for such things are below the Constitutions, since vowed obedience has for its object only what is better than its opposite.[167] For a greater reason, a superior cannot command what is contrary to the Constitutions, anything that is evil or less perfect. Secondly, in the Constitutions a superior finds the strongest and most reliable support. It is not his own personal will as such that he asks others to obey, but the higher will expressed in the Constitutions. A religious has no choice but to accept this higher will once he has made his profession. It is great wisdom for a superior to let the Constitutions be the justification of his conduct and the strength of his commands. For he too, like the subjects, is under the Constitutions, but as a responsible guardian who sees to it that they are observed. Finally, superiors must seek in the Constitutions the safe criterion to discover whether a candidate's vocation comes from God, and whether he has the necessary qualifications. The Constitutions must direct the formation of the subjects. By a careful study of the Constitutions a superior will discover

[165] *Op. cit.*, p. 529.

[166] Choupin, *op. cit.*, p. 353.

[167] Cf. canon 1307.

the essential points he must emphasize and the main virtues whose practice he must recommend. The Constitutions are the touchstone which tells whether the spirit of a candidate, his desires, and aspirations are as high as they should be.

The subjects too can derive much good from the Constitutions. In the first place, the Constitutions are for them a kind and charitable guide that settles the uncertainties of their souls pointing out and warning against the selfish interests of nature and the false maxims of the world. Thanks to the Constitutions, a religious knows every moment of the day what God wants of him, what he must do, and how he must do it. In the second place, the Constitutions are the faithful expression of the perfection to which God calls him. The Constitutions are strength for his weakness and a perennial source of courage and vigor to discharge all his duties. Finally, the Constitutions are like an invisible superior who is always present, reminding him of his duties. They are a just and objective critic, reproaching him when necessary.[168]

Stability of Constitutions

Constitutions, with a few exceptions, have been approved by the Holy See, and therefore it is from the Holy See that they have received their binding force. Consequently their change, interpretation, dispensation, and innovation is subject to the authority of the Holy See.[169] This statement poses the problem of the stability of the Constitutions.

Although it is not difficult to see how a law wisely established in the past might not necessarily be useful at present, one can affirm that the security of an Institute, and its strength, vigor, and success in promoting the interior sanctification and the external apostolate greatly depends upon the stability of its laws. A frequent change of Constitutions endangers interior peace and diminishes one's love for his rules. But on the other hand, the efficacy of an Institute and its in-

[168] Cf. Choupin, *op. cit.*, pp. 358-360.

[169] Gambari, *op. cit.*, p. 525; Maroto, *op. cit.*, p. 54.

fluence upon the life of its members and the customs of society derive in no small measure from laws which are right, adequate, and adapted to the times. Much of the internal vigor and external efficiency of the law comes from the affection and readiness with which the subjects receive it.[170]

The definitive approval given by the Holy See to the Constitutions of congregations means that it is no longer commendable for the Institute to reform them, changing what is fundamental or modifying what is essential. The Constitutions, once approved by the Holy See, are the foundations on which the Institute rests, and which cannot be changed without extinguishing its spirit and endangering the very existence of the Institute.[171] Yet it is not prudent to forget that all positive human law can be improved, and that by its very nature it is subject to a progressive transformation taking into consideration the changes brought about by the passing of time.

In this matter of changes there is no uniformity of practice, outside of a few well-established points of policy. Maroto remarks that it would be absurd to even ask whether the Roman Pontiff has authority to change the Constitutions. It is evident that he may do so.[172] Regarding ecclesiastical superiors below the Holy See, canon 618, § 2, states: "In institutes approved by the Holy See, the local Ordinary may not make any changes in the constitutions." Goyeneche writes that formerly there was a principle of the old law of regulars announcing that religious could change their Constitutions as often as they please, without consulting the Holy See.[173] To a certain extent this is true today of some of the more ancient Institutes.[174] Goyeneche mentions the Dominicans, Augustinians

[170] Wagner, *Historia Constitutionum*, p. 168.

[171] Mothon, *op. cit.*, p. 81.

[172] *Op. cit.*, p. 54.

[173] *Quaestiones Canonicae*, II, 3.

[174] Larraona, *op. cit.*, p. 145.

and Jesuits.[175] The recent address of the Holy Father to the Jesuits makes it clear that whatever has been approved *in forma specifica* cannot be changed without the Pope's consent, precisely (*utpote*) because it was so approved.[176] The law as it applies to congregations was stated in the *Normae* as follows: " It is not within the powers of the General Chapter to modify or interpret authoritatively the Constitutions approved by the Holy See.[177] However, the *Normae* of 1922 do not include that directive, neither is it found in the *Normae* issued in 1940 by the Sacred Congregation for the Propagation of the Faith regarding Constitutions of congregations of diocesan right subject to its jurisdiction. Maroto explains that superiors are not forbidden to have recourse to the Holy See asking for opportune changes, nor are they forbidden to discuss and approve the contemplated changes in the General Chapter.[178] Larraona is even more explicit. He says that " even after the general obligatory revision of Constitutions of some thirty years ago, the Sacred Congregation does not necessarily feel that all the details of all Constitutions must remain forever unchanged. Rome is ready to consider the advisability of changes on certain points, provided the individual communities supply sufficiently valid reasons for the modifications they wish to introduce. Rome wants this evolution to be without spurts or shocks, a genuine vital evolution, imitating the growth and development of a human being. Hence the usual procedure is to require that all proposed modifications be first submitted to a General Chapter, and that the changes be approved by not only an absolute majority, but even the moral unity of the capitulars. In case of urgent modifications, the Sacred Congregation will take action even between General Chapters, but with the obligation to submit the matter to

[175] *Ibidem.*

[176] *AAS.*, XLIX (1957), 811.

[177] *Normae*, 1901, art. 251.

[178] *Op. cit.*, p. 54.

the next Chapter." [179] The intervention of the General Chapter is not considered necessary in the case of minor changes, substitution of words, or abrogation of practices which have become obsolete. Then the consent of the General Council is enough.[180]

In keeping with this policy, the Sacred Congregation requested that some changes be made in the Constitutions of the Order of Friars Minor especially concerning government.[181] A good plan for the revision of the Constitutions was adopted by the same Order of Friars Minor at its chapter in 1951 under Perantoni as Superior General. It can help others set their goal right. The ends of the revision were summed up as follows: "a) To correct the errors discovered in the Constitutions; b) to word clearly what is ambiguous, to clarify the obscure, to perfect what is imperfect, to supply what is lacking, and to correct what is less apt for the purpose; c) to provide a better system of formation, and to supply the means necessary to prevent relaxation." [182]

The stability of the Constitutions may be affected not only by a change, but also by interpretation and by dispensation. Therefore it is important to know what rules apply here, in order to safeguard the mind of the Church and the proper stability of the particular laws of the religious life.

Regarding the interpretation of Constitutions, Maroto sums up the law in a few lines. Some Constitutions, he says, have never been approved by the Holy See. They are nothing but general norms, generally issued by the General Chapters. Their authentic interpretation is given by those properly authorized (in the Institute).[183] Some Rules and Constitutions have been approved by the Holy See, either *in forma*

[179] *Discourse to the Reverend Mothers General,* (Rome, 1952), mimeographed notes.

[180] Larraona, *CpR.,* XIV (1933) 61.

[181] Wagner, *Historia Constitutionum,* p. 116.

[182] Wagner, *op. cit.,* p. 115.

[183] *CpR.,* I (1920), 42.

communi or *in forma specifica*. The power to interpret them was either expressly reserved to the Holy See or expressly given to the Institute. Regarding the Constitutions of the more recent congregations, the power to interpret them authentically is expressly reserved to the Holy See. In this case art. 251 of the original *Normae* applies: "Without the intervention of the Holy See, the General Chapter may not modify or interpret authentically the constitutions approved by the Holy See". An expressly given delegation is sometimes limited to authorize an interpretation with only moral effects, that is, for the tranquility of conscience; but it leaves the canonical effects unchanged. At other times the interpretation will also produce canonical effects. This type of faculty has been given, among other Institutes, to the Franciscans (not regarding the Rule, but only for the Constitutions), Carmelites, Jesuits, Barnabites and Claretians.[184] Finally, there are some Rules and Constitutions approved by the Holy See but nothing has been directly stated about their interpretation. Then the following principle applies: Religious Chapters and Superiors may give a declaration and fix the meaning of the Constitutions; these acts, however, shall obtain the force of law, or the interpretation will be considered authentic, only when the Holy See shall give its approval.[185] Tabera makes a distinction regarding the interpretation of Rules and Constitutions approved by the Holy See by superiors with the power of jurisdiction. He denies them any authority to give an *extensive* interpretation, but states that it seems that they have the power to give a *declarative* interpretation.[186]

Dispensation

Dispensation has a very important function in all kinds of society. The lesser the number of laws and the greater the reverence towards them, the lesser the need of dispensations.

[184] *Op. cit.*, p. 43.

[185] Maroto, *op. cit.*, p. 44.

[186] *Op. cit.*, p. 85.

Now that the number of laws has been multiplied and reverence is perhaps not the outstanding quality of the present age, dispensations may be a real moral necessity.[187]

Regarding dispensations from the Constitutions, the common law states: "Superiors may even dispense them (professors and students) from certain common observances, even from choir, especially from the night office, as often as they judge such dispensation to be for the success of their studies".[188] Outside of these cases, the Code of Canon Law allows no more powers to dispense from the Constitutions. Superiors are not above the Constitutions and therefore may not dispense from or change them at will.[189] Taking into consideration the jurisprudence of the Holy See concerning new congregations, as contained in the original *Normae* which allowed the local superiors to dispense from some of the prescriptions of the Constitutions (art. 316), and considering also the special character of the Constitutions which at times regulate even unimportant acts of daily life, it is not unreasonable to conclude that even local superiors have the power to dispense at least from some of the prescriptions of the Constitutions.[190]

Authors generally distinguish between constitutive and disciplinary norms. This distinction was introduced by the historical evolution of the canonical doctrine about the powers of religious superiors to dispense from Rules and Constitutions.[191] Ledwolorz believes that Goyeneche[192] was the first canonist to write that superiors cannot dispense from constitutive articles of the Constitutions.[193] That does not seem to

[187] Cf. Michiels, *Normae Generales*, II, 689.

[188] Canon 589, § 2.

[189] Cf. canon 84, § 1.

[190] Ledwolorz, *De Potestate Superiorum O. F. M. Dispensandi* in *Antonianum*, XXX (1955), 247.

[191] Ledwolorz, *op. cit.*, p. 249.

[192] *CpR.*, III (1922), 56.

[193] *Op. cit.*, p. 250, note 3.

be the case, for Goyeneche took the statement from Vicente.[194] Constitutive norms, according to Escudero, are the norms which deal with the form and manner of government and direction of an Institute, and which regulate what pertains to the office of superiors and other officials, the manner of their appointment, and the way they must proceed in their meetings.[195] The term " constitutive " has been recently explained in the Constitutions of the Order of Friars Minor to mean things pertaining to the organization and government of the order.[196] Disciplinary laws deal with the daily life of religious and specify their obligations and the order and schedule of the common life.[197] Writers are not entirely agreed as to which laws are constitutive and which disciplinary.[198] The index of Constitutions will generally provide sufficient practical information on this matter.

It is more difficult to dispense from constitutive than from disciplinary laws. Generally, the internal superiors may not dispense from constitutive laws or from what pertains to the essence of the religious life; recourse to the Holy See will be necessary in such cases.[199] Actually the Holy See could grant faculties to superiors to dispense even in constitutive points of the Constitutions. But it is not generally done, in order to avoid disturbances in the government; in small things it could more easily be granted.[200]

Disciplinary norms taken from the Code of Canon Law cannot be dispensed by the religious superiors. The powers granted by canon 81 are not being considered here. Likewise,

194 *Recentia Instituta,* (Madrid, 1917) p. 124.

195 *Dispensation of Disciplinary Norms of the Constitutions* in *Vida Relig.,* VI (1949) p. 398.

196 Ledwolorz, *op. cit.,* p. 251.

197 Escudero, *Vida Relig.,* VI, 399.

198 Cf. Ledwolorz, *l. c.*

199 Cf. Goyeneche, *CpR.,* III (1922), 56; Ledwolorz, *op. cit.,* p. 249; Escudero, *ibidem,* p. 399; Schaefer, *op. cit.,* p. 240.

200 Ledwolorz, *op. cit.,* 252.

things pertaining to the common good and explicitly or implicitly reserved by the Constitutions are also beyond the powers of the religious superiors to dispense.[201]

By reason of their dominative power, all superiors (men and women) may in every single case, for a just and adequate reason, declare their subjects free from an obligation imposed by the Constitutions. But superiors without powers of jurisdiction may not in virtue of their dominative power dispense in the strict sense from ecclesiastical laws.[202]

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201 Cf. Escudero, *op. cit.*, p. 400; Ledwolorz, *op. cit.*, p. 253.

202 Schaefer, *op. cit.*, p. 240.

Cases and Studies

ROMAN REPLIES *

DIOCESE OF MADISON:

BAPTISM INVALID BY DEFECT OF FORM AND MATTER—
MARRIAGE DISSOLVED IN FAVOR OF THE FAITH

Francis was born in the year 1915 in the State of Wisconsin. His parents on occasion attended the Swiss Reform Church, but Francis received little religious instruction. However, at the age of three, his parents took Francis to the minister of the Swiss Reform Church and Francis was baptized in the home of the minister.

The certificate of his baptism was obtained and indicated that Francis had been baptized—"Im namen des Dreieinigen Gottes getauft worden". There is some confusion as to the manner of baptism, but his parents relate that Francis was baptized in this manner: the minister read from a ritual, Francis was on the floor playing with the cat, the minister's wife was preparing lunch in another room, no sponsors were present, the parents alone observed the ceremony. The parents of Francis are not sure of their statements, but they do not think water was used. The minister and his wife are no longer living.

In 1933, at the age of 18, Francis married Nancy, a baptized Lutheran. No children were born of this union. The marriage lasted twenty years; and in 1953, Nancy left Francis to marry Alfred.

Francis became interested in the Catholic Faith, took instructions and was baptized conditionally on December 28, 1955. Through his instructions he became familiar with the possibility of a dissolution of his marriage to Nancy and submitted his case to the Madison Tribunal. The Acta of the case were completed and forwarded to the Holy Office.

* Reported at the annual regional meeting of The Canon Law Society of America on May 27, 1958 at Madison, Wisconsin.

On July 3, 1957, the following reply was received from the Holy Office: Ut res definiri valeat velit Excellentia Tua Rev.ma curare ut acta prout sequitur compleantur:

1. Inquiratur circa modum administrandi baptismum, servatum sive generaliter in secta, sive a ministro, qui oratorem baptizavit;
2. a viris peritis inquiratur quae sit indoles generalis huius "Ecclesiae Reformatae Helveticae";
3. inquiratur quae fuerit indoles generalis ministelli, quomodo generatim baptizaverit, num aqua uti soleret;
4. exquiratur ab oratore eiusque parentibus ex quo tempore de valore baptismatis, de absentia aquae dubitare coeperint, num iam tempore non suspecto de hac re locuti sint;
5. defensor vinculi in Curia Dioecesana observationes scribat.

In accord with this request, a further investigation was made. It seems there was a great deal of confusion regarding the minister and the Church in which Francis was baptized. It became evident that a Swiss Reform Church was not involved. A Swiss settlement simply referred to the Evangelical and Reformed Church as the Swiss Reform Church. No Swiss Reform minister was at hand, and consequently a Lutheran minister took care of the needs of the Swiss people. This so-called Swiss Reform Church, which was really Evangelical and Reformed, served by a Lutheran minister, later merged with the Congregational Church and became known as the United Church of Christ.

The testimony of the former pastor of this Church, now retired, indicates that it is entirely possible that no water was used in the act of baptism. This minister declared further that the words which appear on the certificate are without doubt the words that were used. The testimony of the present pastor of this Church indicates that no set formula need be used in the act of baptism, that it is not absolutely necessary to use water in the act of baptism, and that baptism is not absolutely necessary for salvation!

The petitioner, another witness (of no value), and his parents were again interrogated. The *votum* of the Bishop rather strongly recognized the invalidity of the baptism *propter defectum formae et materiae*. The additional testimony was forwarded to Rome.

In April, 1958, the Holy Office recognized the baptism of Francis as invalid and His Holiness granted the dissolution of his marriage to Nancy *in favorem fidei,* allowing him to contract Christian nuptials with Bubbles, a Catholic.

DIOCESE OF MADISON:

DISSOLUTION REQUESTED OF MARRIAGE CONTRACTED WITH A DISPENSATION FROM DISPARITY OF CULT

Bernard was born May 29, 1919, of Catholic parents. He himself was reared Catholic. On February 14, 1952 [*sic;* 1942?], Bernard married Irene who was never baptized, in a Catholic rectory before a Catholic priest, after a dispensation from disparity of cult had been obtained from the proper Ordinary.

The marriage lasted three months. No children were born of this union since the defendant admitted that she always practiced contraception by way of medication and never wanted children by Bernard. The defendant obtained a divorce and one year later remarried. Two years after her marriage to her second husband, Irene was baptized in the Congregational Church. This baptism of the defendant took place three years after her separation and divorce from Bernard.

On January 15, 1948 [*sic*], Bernard married a Catholic before a Justice of the Peace. Two sons were born of this union, both baptized and reared Catholic. In October, 1956, Bernard petitioned the Madison Tribunal for a dissolution of his marriage to Irene in order to validate his present civil marriage. The necessary testimony was obtained and the case forwarded to Rome.

SUPREMA S. CONGREGATIO
SANCTI OFFICII

die 14 februarii 1958

Your Excellency,

With regard to the process for dissolution of the marriage of Bernard, Catholic, and Irene, unbaptized, this Supreme S. Congregation, after careful study and consideration of all the acts of the case, has decreed as follows:

1. Negative, quoad dissolutionem matrimonii in casu.

2. Compleantur acta, profundius inquirendo circa exclusionem boni prolis eiusque causam.

Assuring Your Excellency of my sentiments of high esteem and regard, I am,

Very sincerely yours,
/s/ Cardinal Pizzardo, *a secr.*

Diocese of Madison:

NULLITY BECAUSE OF DISPARITY OF CULT OR DISSOLUTION IN FAVOR OF THE FAITH

Thomas was born May 15, 1892, and reared with little or no religious training. He was never baptized. However, his parents are both deceased. Only the testimony of a brother is at hand which indicates his non-baptism.

On March 4, 1918, Thomas married Susie, allegedly baptized in the Wisconsin River at the age of 14 and in the year 1911 by a minister of a Christian Church. No children were born of this union, and the marriage terminated in divorce on September 4, 1931. Thomas subsequently married a Catholic, and now desires to have this marriage validated after he himself becomes a Catholic.

There is some confusion as to the time of Susie's baptism. Susie states that she was baptized in the summer of 1911, seven years prior to the promulgation of the Code. Other witnesses are not able to state the specific time of her baptism, but they do state that she was baptized. The secretary of the Christian Church states that no one was accepted for membership in this Church unless previously baptized, and that the name of Susie appears on the records of membership in this Church, dated September 11, 1918.

The minister of this Church declares that the records from the years of 1906 to 1914 were destroyed by fire, and hence a record of her baptism, indicating the precise time of baptism, is not available. He states further that the fact that the name of Susie does not appear on the membership records until September 11, 1918, does not necessarily mean that Susie was not baptized before this date. In accord with the decree of June 10, 1937, the case was referred to the Holy Office.

The following response was received from the Holy Office:

Rite pervenerunt ad S. Officium acta in causa solutionis, in favorem fidei, matrimonii anno 1918 contracti inter Thomam, uti dicitur, non baptizatum, et Susannam, acatholicam baptizatam.

Ut res definiri valeat velit Excellentia Tua Reverendissima curare ut, ad normam iuris, colligantur probationes circa non baptismum oratoris et circa baptismum partis conventae ante matrimonium.

Utraque probatione absoluta, Excellentia Tua matrimonii nullitatem, ob impedimentum disparitatis cultus, declarare potest.

Si vero haec de quibus supra non constiterint, Excellentia Tua curet ut inquisitiones fiant circa carentiam baptismi in oratore et huiusmodi acta ad S. Officium mittantur.

Hanc occasionem nactus impensos aestimationis meae sensus Tibi obtestor permanens.

Excellentiae Tuae Reverendissimae
addictissimus
/s/ Cardinal Pizzardo, *a secr.*

Further proof of the non-baptism of Thomas was obtained, as well as further proof for the baptism of Susie before her marriage to Thomas, and the marriage of Thomas and Susie was declared null because of the impediment of disparity of cult.

Diocese of Madison:

RATUM ET NON-CONSUMMATUM

Titius was born in 1891 of Catholic parents. He was reared a Catholic in the present territory of the Diocese of Madison. In 1927, Titius married Jezabel in a Catholic rectory before a Catholic priest in a small town in Iowa. A dispensation from mixed religion had been obtained by the local pastor. There was no doubt that Jezabel had been baptized a Methodist in infancy.

The marriage lasted three months. Even though the parties lived under the same roof, *matrimonium numquam consummatum est.* The case was started before the Madison Tribunal on the grounds that the respondent had placed an intention *contra bonum prolis* when entering this marriage. However, the respondent replied in the interrogation that she did not have an intention to

perpetually exclude all right to the conjugal act! In accord with the provisions of the Instruction *Provida* of the Sacred congregation of the Sacraments issued August 15, 1936, and the *regulae* of the decree *Catholica Doctrina* issued by the same Congregation on May 7, 1923, the cause proceeded as a ratified but non-consummated marriage.

Numbers *a* and *c* of Rule *80* of *Catholica Doctrina* which enumerate the usual causes of non-consummation, were particularly relevant: a) *ex defectu veri consensus in matrimonium;* c) *ex aversione et odio in ipso vitae conjugalis initio exortis inter sponsos.*

The *argumentum coarctatum* was automatically ruled out as possible proof, since both parties admitted cohabitation. The *argumentum physicum* was likewise ruled out in view of the refusal of the respondent to co-operate. The *argumentum morale,* viz., the *"iurata confessio conjugum"* was the chief and only proof of the contention. The usual *septimae manus* witnesses were obtained for the petitioner. The respondent refused at first to testify, but finally consented to be interrogated *by mail.* Only one other witness was available for the respondent, her brother. The acts of the case were completed and forwarded to the Holy Office.

Response of the Holy Office: *"Pro gratia!"*

ARCHDIOCESE OF MILWAUKEE:

DISSOLUTION OF MARRIAGE IN *favorem fidei* WITH A *sanatio in radice*

1. Some years ago a certain Jasper and Mary Isabelle, both non-Catholic, who were "re-married" to each other, completed the entire course for converts at Gesu Parish, Milwaukee. In the opinion of the priest catechist, this couple was ready to be received into the Church but there was an obstacle inasmuch as a question arose about the validity of this couple's marriage.
2. Jasper, whose baptismal status, after investigation, is still uncertain, at the age of fifteen completed, married Mary, a non-Catholic, probably unbaptized, at the age of fourteen completed, in Dubuque, Iowa on August 16, 1935. Both principals at the time of this marriage had their residence in the State of Wisconsin. The parents of both parties gave consent to the

marriage of these minors; in fact, at least two of these parents are listed as witnesses to the marriage.

According to her birth certificate, Mary Isabelle was born July 6, 1921 in one of the townships of Grant County, Wisconsin. We also have a certificate to the effect that Jasper was born February 2, 1920 in a small town of Ouray County, Colorado. We have an application for license for marriage on the part of Jasper (age sixteen next birthday) and Mary (age fifteen next birthday) issued by the County Clerk of the County of Dubuque, and we also have the certificate of the marriage of these two principals which was solemnized by a judge on August 16, 1935 in Dubuque, Iowa.

3. The principals to this marriage returned to a small town or city in Wisconsin whereupon five days after the marriage the judge in that small city sentenced (until the age of twenty-one) Jasper and Mary Isabelle to Industrial Schools, respectively for boys and girls. Sometime after their " releases " from the Industrial Schools, Jasper and Mary, being of the opinion that their first marriage ceremony was null, started again to keep company with " remarriage " in view. However, before " remarrying " Jasper left for the Army, and because of a previous quarrel, corresponded very little with Mary.

4. On August 31, 1942, Mary, without taking legal action to rescind her Dubuque marriage with Jasper, married a certain Harold in Freeport, Illinois before a Protestant minister. This Harold was presumably free to marry and a non-Catholic, but we have no information concerning his baptismal status. Mary will not contact Harold, for she feels that he would make trouble for her.

   Contrary to her prior belief, Mary now learned that her first marriage to Jasper was legal, and to make matters " legal " with civil authorities, Mary, already wed to Harold, divorced Jasper on October 4, 1943 in Sycamore, Ill.

5. Without benefit of divorce from Harold, Mary, on December 4, 1945 married Jasper before a minister in a small city of Wisconsin in the County of Vernon.

6. As to the *Baptismal Status of Jasper:*

Jasper's mother thought that he was baptized as an infant in a Presbyterian church in a small town of Colorado but no certificate of baptism has been found in that church nor in the neighboring churches. Inquiries were also directed to non-Catholic churches in the small town of Wisconsin and vicinity where Jasper spent some of his early years, but no baptismal record was found. To another inquiry about the baptism of Jasper, the pastor of Free Methodist Church, La Farge, Wisconsin, writes there is no record concerning the baptism of Jasper but adds " as a usual thing, the children of the families that attend our church are baptized ". Jasper, himself, in a letter to the priest catechist writes: " Now about my being baptized. I don't know anyone who knows for sure if I was baptized or not, my mother thought I was, but now she don't (*sic*) know for sure or not."

7. As to the *Baptismal Status of Mary Isabelle:*

Both her parents are dead, but an older brother and sister depose that their parents had no religion, and the sister is positive that Mary was not baptized, while the brother is " pretty sure she wasn't baptized ". Another senior brother of Mary's claims the Methodist religion for their parents but adds that the parents had never baptized them, and he presumes that Mary, his sister, was not baptized. Mary, herself, is of the belief that she was never baptized, there being no religion in the family.

8. *As to the Validity of the Jasper—Mary Isabelle Marriage:*

The Presiding Judge in the Juvenile Court of Vernon County, Wisconsin in the commitment order, considered the Jasper—Mary Isabelle marriage illegal. In his written opinion, a civil attorney of Milwaukee, Wisconsin claims that the Jasper —Mary Isabelle marriage was a valid marriage in the State of Iowa, although it " could have been voided at the option of the male (Jasper), because he was under the age of sixteen, within six months after he attained the age of sixteen ". It is also the studied opinion of the same attorney that the

Jasper—Mary Isabelle marriage is a valid marriage in the State of Wisconsin but that the Harold—Mary Isabelle marriage was void "*ab initio*".

The following questions were proposed to the Holy Office:

1. May Jasper and Mary Isabelle be permitted to cohabit as legitimate husband and wife?
2. May Jasper and Mary Isabelle be admitted to baptism in the Catholic Church?

After receiving the Acta on the Jasper—Mary Isabelle case, the Holy See made this request:

> "Ut res definiri valeat velit Excellentia Tua Reverendissima curare ut afferantur validiores probationes de carentia baptismi in parte conventa atque investigationes fiant in ecclesiis acatholicis."

SUPREMA SACRA CONGREGATIO
SANCTI OFFICII

Prot. N. 2772/55

DISSOLUTIONIS MATRIMONII IN FAVOREM FIDEI

Actis maturo examini subiectis, expletisque omnibus in casu explendis, die 29 julii 1957 quaestio proposita est in hac Suprema S. Congregatione, quae ad dubium: "An consilium praestandum sit Ss.mo pro dissolutione, in favorem fidei, matrimonii, de quo supra, ut oratrici, praevio baptismo ipsius ac viri sanatio in radice concedatur pro matrimonio ab ipsa, attentato cum praedicto viro," re iuxta certas statutas regulas discussa, respondendum decrevit:

"AFFIRMATIVE"

Datum Romae, ex Aedibus S. Officii, die 9 augusti 1957.

ARCHDIOCESE OF CHICAGO:

PRIVILEGE OF THE FAITH—INVALID FORM OF BAPTISM

Titus went through a baptismal ceremony (by immersion) in the First Christian Church at the age of twelve. He later became an

Episcopalian minister and married a girl who had been baptized in the Episcopalian Church. After a divorce, he became a Catholic, and entered his petition for the Privilege of the Faith on the basis that his baptism was invalid because an invalid form was used: viz. " I baptize thee in the name of Jesus Christ unto the remission of sins ". After some conflicting statements, the minister agreed that this was their form used. The case was sent to Rome; the Holy Office replied in the negative. After further inquiry, the Holy Office replied: the form is clearly invalid; but further proof is needed that this form was actually used. The case is still pending.

ARCHDIOCESE OF CHICAGO:

BAPTISM BY ASPERSION INVALID—SOLUTION IN FAVOR OF THE FAITH *

Titus originally presented his case to the Tribunal as a marriage of doubtful validity because of the questionable intention of the defendant *contra bonum Sacramenti.* At that time, presumably *tempore non suspecto,* he stated that he had never been baptized. The defendant was a baptized Lutheran. The case was rejected by the Tribunal, and remanded to the Roman Department. It was several years before Titus resumed his case however; and when he did, a doubt arose about his baptismal status. When he was about fifteen years old, a neighbor lady called her minister from the Evangelical United Brethren Church to the home to baptize the infant sister of Titus. The minister baptized the baby by sprinkling water from a glass. The mother of Titus, the neighbor, and two sisters of Titus (ages 11 and 9) were present for the ceremony. The minister and the neighbor are no longer living. According to the present minister of the Church, however, the names of Titus and his sisters were also entered in the baptismal register for that day, although the minister refused to allow the local priest to examine the register personally. Titus, his mother, and his sister testified that the water did not strike him. Titus moreover, stated that he had been attending the Catholic Church as a child, and was unwilling to be baptized in the United Brethren Church. The family had permitted the Minister to come only because the neighbor lady had taken a fancy to the baby and wanted her baptized.

* See the case in *The Jurist,* XVII (Oct. 1957), 446.

The Decree from the Holy Office stated the marriage was dissolved in virtue of Privilege of the Faith on the basis of the non-baptism of Titus.

ARCHDIOCESE OF CHICAGO:

DEFENDANT ONLY WITNESS FOR NON-BAPTISM—PRIVILEGE GRANTED

Edna, a baptized Baptist, petitioned for a dissolution of her marriage to Titus on the basis of his non-baptism. The Holy Office granted the dissolution in spite of the fact that the proof of non-baptism was very weak. The defendant was actually the only witness to testify definitely that he was never baptized. All his relatives are dead, except for an aunt, a cousin, and a friend.. The petitioner said she did not think the defendant was baptized because when they were children he told her that he was never baptized. The defendant said that his parents were Baptist, and did not believe in infant baptism; and he said his mother told him he was never baptized. The aunt, cousin and friend all admitted that they did not know whether or not the defendant was baptized, and said that they recalled hearing the defendant's parents express their belief in the necessity of baptism after the age of ten or eleven.

ARCHDIOCESE OF MONTREAL:

BAPTIZED RUSSIAN ORTHODOX WOMAN AND NON-BAPTIZED MAN—MARRIAGE INVALID FOR DISPARITY OF CULT

SUPREMA S. CONGREGAZIONE
DEL SANTO OFFIZIO

Eminentissime ac Rev.me Domine Mi Obs.me,

Litteris die 15 Februarii 1957 datis Eminentia Tua Rev.ma casum proponebat nullitatis matrimonii initi die 31 Augusti 1946 coram ministello acatholico inter James ..... non baptizatum et Lila ..... in secta schismatica orientali baptizatam.

Ad rem notum Tibi facio Eminentiam Tuam Rev.mam, nullum declarare posse matrimonium in casu, quatenus constet James ..... baptizatum non fuisse tempore matrimonii, et Lila ..... baptizatam fuisse in secta schismatica orientali.

Hanc occasionem nactus Manus Tuas humiliter deosculor ac peculiares sensus altissimae venerationis mea Tibi obtestor permanens.

Eminentiae Tuae Rev.mae
humillus ac dev.mus servus
(subscr.) A. Card. Ottaviani

Em.mo ac Rev.mo Domino
D.no PAULO E. LEGER
Archiepiscopo
MARIANOPOLITAN.

ARCHDIOCESE OF INDIANAPOLIS:

MARRIAGE INVALID BECAUSE DISPENSATION FROM DISPARITY OF CULT GRANTED BY LATIN ORDINARY INVALID

In 1944 a Catholic girl, daughter of Ruthenian parents, and baptized in a Ruthenian church in Pennsylvania, but at that time living with her parents in Brooklyn, obtained a dispensation from the Latin Ordinary and contracted marriage with an unbaptized man before a Latin pastor in Brooklyn. Her folks had been members of the Ruthenian parish there, but had been attending the Latin Rite church by reason of some disagreement with the Ruthenian pastor.

The marriage in question ended in divorce. On the vagrant chance that the present Oriental law of the form may have perhaps been considered to apply in the law previously binding Ruthenians to the form in this country, and that therefore this marriage may have been invalid by reason of lack of form, since it took place before a Latin priest, we asked the Apostolic Delegate to make some inquiry about this from the Sacred Congregation for Orientals. We duly received an acknowledgement from him that the matter had been transmitted to that Congregation, and then heard nothing more about the case for more than a year.

THE SACRED CONGREGATION OF THE HOLY OFFICE:

Recently we received a rescript from the Holy Office, stating that inasmuch as the dispensation from disparity of worship was granted by the Latin Ordinary, the marriage was invalid. The reason was

not explicitly stated, but the only conclusion is that the disparity of worship dispensation was invalid. Nor is there any evidence whatevere that the Holy Office was granting a dissolution from the Holy Father, for its decision is simply "*constare de nullitate.*"

ARCHDIOCESE OF TORONTO:

VARIA

1. SPEED—one Privilege of the Faith decision was given in about five weeks' time, the average being about seven to eight months.
2. NOT SO SPEEDY—Most "*ratum et non-consummatum*" cases took a little over a year in the Holy Office, and longer still with the Sacred Congregation of the Sacraments.
3. A FIRST FOR THEM—One of our Privilege of the Faith rescripts granted the convert the privilege of entering marriage with a non-Catholic. It was the first rescript of this kind that we received. The petitioner in our case became a Catholic after her marriage broke up, attempted marriage with a non-Catholic, and then asked for the Privilege of the Faith.
4. PRIVILEGE OF THE FAITH—We have our first petition pending concerning a marriage performed in the Church with a dispensation from the impediment of disparity of cult.

ARCHDIOCESE OF MILWAUKEE:

Dubia CONCERNING DEATH OF PRO-SYNODAL JUDGE AFTER THE DECISION BUT BEFORE PUBLICATION OF SENTENCE

CURIA ARCHIDIOESANA MILWAUCHIENSIS

die 12 martii 1958

Eminentissime Princeps,

In Tribunali suffraganeo primae instantiae unus e iudicibus collegialibus in causis matrimonialibus conclusiones suas (ad normam c. 1871) rite subsignavit. Medio autem tempore inter decisionem et prolationem sententiae e vita functus est. Nunc oriuntur dubia:

I) In una causa, sententia publicata, actor ad Tribunal Metropolitanum appellavit. Quaeritur: utrum appellatio utpote a sententia nulla interposita reiicienda sit propter carentiam

subscriptionis iudicis iam mortui (c. 1894, 3); an Summus Pontifiex petendus sit pro sanatione sententiae primae instantiae quia subscriptione iudicis interea defuncti careat?

II) In alterna causa, decisione partibus iam communicata (iuxta art. 199, Instr. S. C. Sacr., Provida, 1936), sententia autem nondum lata, quaeritur: utrum possit sententia ferri et publicari subsignatione aliorum judicum, adnexo folio decisionis subscriptae a iudice defuncto; an possit iudex substitutus nominari qui sententiam tunc subscribat?

III) In genere, si decisio manet adhuc secreta atque collegio interna et nullo modo nullave ratione publicata, quaeritur: utrum, postquam iudex substitutus acta consideravit et contraria argumenta proposuit, collegium possit rem iterum perpendere et propositam decisionem, si casus ferat, immutare; an iudici substituto nil amplius restet ut sententiam tantum subscribat?

Hac occasione utor ut impensos aestimationis meae sensus Tibi pandam permanens

Excellentiae Tuae Rev.mae
addictissimus
/s/ Albertus Gregorius Meyer
Archiepiscopus Milwauchiensis

Suae Eminentiae
Benedicto Cardinali Aloisio Masella, Praefecto
Sacrae Congregationis de Disciplina Sacramentorum

(A RESPONSE—Private response from Father Goyeneche, a Professor at the Lateran: "If the sentences were made '*modo definitivo*', the problem would be '*sanabile*'; if not, a '*nullitas insanabilis*' would result, and a new judge should be named." Father Goyeneche advised presenting the question to the Congregation of the Sacraments).

SACRED CONGREGATION OF THE SACRAMENTS

(Msgr. Bartoccetti)

"Si nomina il nuovo giudice, si fa una nuova adunanza, e si dà la sentenza che sarà firmata dai 3 chi sono nominati." Monsignor

Bartoccetti advised the Tribunal of First Instance (Madison) to name a new judge, call another meeting, and re-issue the sentence signed by the three judges. He stated that sanations of such problems by the Holy See are not welcome requests, and this simple solution is much more satisfactory from all angles.

Diocese of Yakima:

BINATION ON WEEKDAYS

The Sacred Congregation of the Sacraments in granting to the Ordinary of the Diocese of Yakima a three year renewal of the faculty whereby the priests serving this Diocese may binate on weekdays, has modified the conditions. Here is the text of the rescript:

Celebrandi Missam bis diebus etiam ferialibus sed tantum

1. occasione matrimonii et Missae exequialis;
2. sextodecimo quoque die ad renovandas Sacras Species in capellis Religiosarum;
3. *bis in hebdomada* in singulis paroeciis, ita ut secunda Missa litari possit horis vespertinis.

Dummodo *bonum spirituale notabilis partis christifidelium id postulet* et nullus alius sacerdos liber praesto sit pro celebratione alterius Missae, vetita insuper celebranti eleemosynae perceptione pro secunda Missa (can. 824), ceterisque servatis de iure servandis.

We have italicized the new restrictions.

* * * * *

THE CATHOLIC LAWYER AND DIVORCE*

It is a truism to say that divorce with all of its consequent evils is one of the most disturbing factors of our present-day society. The subject of divorce concerns not only the clergy, but I am sure that the members of the legal profession find that an increasing amount of their work is composed of the ligitation of divorce cases and other matters relating to them. I shall speak only of this problem in relation to the lawyer. Obviously, priests, pastors, and Chancery Officials alike must also strive to solve this problem.

This is a small attempt to state the case and to present some suggestions and solutions. First, let us examine the natural law and the Church's definition and extension of it in regard to marriage and divorce. Then let us examine the contrasting views of these matters taken by the civil law. What is the Catholic lawyer to do in the face of this conflict?

Marriage as established by God and restored by Christ is a permanent union of one man and one woman for the purposes of procreating and educating children and to provide mutual consolation and support. Once a sacramental marriage union has been consummated, there can be no question of absolute divorce; that is, the marriage bond cannot be broken except by death. Hence, when we speak of divorce in relation to the civil law, we can only mean the permanent or temporary separation of the spouses or what is called imperfect divorce. God has established the state of marriage, and He alone can dissolve the bond. The Church, in certain instances, can exercise this divine power, e.g., in the Pauline Privilege, but never can she dissolve the bond of consummated sacramental marriage. God has not granted the power to dissolve the marriage bond to civil authority.

The Church, knowing the weakness of human nature, admits certain causes for which the partners to a marriage may separate either permanently or for a time.[1] Marriage of its nature demands

* Paper read by the Very Reverend Monsignor Gerald O'Keefe, Chancellor of the Archdiocese of St. Paul, at the annual regional meeting of The Canon Law Society of America on May 27, 1958 at Madison, Wisconsin.

[1] Cf. can. 1129; can. 1131.

the cohabitation of the partners. To interrupt this common life or to break it off permanently demands serious cause. The Church recognizes adultery as the single reason for allowing permanent separation of the spouses. Even here, certain conditions must be met. It must be morally certain that adultery has been committed. If the other party approved, condoned, or provoked the adultery or committed adultery himself, separation for this cause is not permissible. But if the other partner is innocent, then he or she may separate permanently with no obligation to resume married life. It is to be noted, of course, that the marriage bond remains unbroken even in this case. The separation is not obligatory.

The causes given for indefinite temporary separation are these: If either spouse becomes a non-Catholic; if he educates the children as non-Catholics; if he lives a criminal and infamous life; if there is danger of grave spiritual or physical harm to the other; if he by his threats or abuse makes the common life very difficult. There are other reasons of like nature mentioned in the Code of Canon Law (Canon 1131). Other reasons recognized by the Church are: the mental abnormality of one of the parties; malicious desertion, unprovoked and with no intention to return; and persistent practice of onanism and other irreligious and immoral acts.[2] In the case of temporary separation, the petitioner must normally present the case to the Ordinary of the Diocese for decision although the Code provides that in the case where there is danger in delay, the person may act on his own judgment. The Ordinary determines in what way his judgment will be arrived at and expressed. He will also determine the conditions of the separation, how long it is to last and so on. But always the bond of marriage remains. The Church does recognize the authority of the civil law to regulate the merely civil effects of the separation of the spouses.

The civil law in the United States maintains the right of the State to dissolve the bond of marriage. In fact, I believe our courts would insist that this is the exclusive right of the civil courts. So, the civil law and the ecclesiastical law are in conflict. Because of this, difficulties arise. In some States a temporary or permanent separation of the parties would not be possible either because the

[2] Cf. Kelly, James P.—*Jurist* Vol. VI, No. 2, p. 201-202.

law does not permit it or because the law raises difficulties which make it almost impossible. It is interesting to note that divorce is a concept unknown to the common law. The civil law of divorce is purely statutory. It represents, of course, the decline in public morality in these recent years. As the lawyers in the audience know, the civil law has undergone a great change in this regard. This has made divorce easier to obtain and so much the more common.

It is inevitable that the Catholic lawyer will be faced with the problem of divorce actions—what can he do? what should he do? As you well know, these problems must be solved by you as Catholics as well as citizens and lawyers. First of all, when the attorney is asked to represent a Catholic in a divorce action, what should he do?

If the Catholic is in an attempted merely civil marriage relationship recognized by the State, but which actually is not a marriage, the attorney could proceed with good conscience since this will remove the Catholic from a sinful union. However, in this case of a Catholic in a merely civil union, the attorney should be assured of the truth of these allegations of his client.

Then there are the cases in which Catholics are validly married, but who for grave reason cannot live with their spouses. As we have seen, the Church recognizes permanent separation of the spouses only for the reason of adultery, although there may be temporary separation for grave causes. The Council of Baltimore [3] and the common law of the Church [3a] require that the permission of the Ordinary be sought. So even in these cases, the first advice to the client is to seek this permission. The procedure in each diocese will differ. Perhaps the best way is to advise the client to see his parish priest. Once the Ordinary's permission has been obtained, the client and attorney may proceed according to the pertinent legitimate provisions of civil law within the limits set by the Ordinary. Here is another difficulty. Sometimes it is either legally impossible or inadvisable to seek a separation. Whenever a separate maintenance or legal separation is legally feasible, it

[3] Decrees of III Plenary Council of Baltimore, n. 124; 126.

[3a] Cf. can. 1016; can. 20; can. 1960-1961; S. Congr. Sacram. 15 aug. 1936, Instr. *Provida,* Art. 1.

should be used in preference to divorce. Often the Ordinary will permit a civil divorce action, putting the burden on the parties to restore the communal life whenever it should become possible. The Catholic lawyer cannot in good consicence accept divorce cases of Catholics who have not complied with the provisions of Canon Law under the principle that the attorney is the agent of his client and may do only what is permitted to his client. Moreover, if there is no real cause for divorce, the attorney should in charity try to effect a reconciliation.

The Catholic attorney will, of course, be approached by non-Catholics who wish to seek a divorce. Here there are more difficulties. It is, of course, permissible to represent a non-Catholic who is striving to get out of a merely civil marriage to a Catholic; a non-Catholic in a bigamous union—and this in the broad sense of the moral law—could petition for a divorce. The innocent party in the case of adultery could be a client. Beyond these cases, the matter becomes very uncertain. Who is to determine the justice of the client's claims? Obviously, the non-Catholic will not seek the permission of the Catholic Church.

Perhaps the norm suggested by the distinguished Chancellor of the Archdiocese of Chicago is the most workable.[4] The Catholic lawyer may represent a non-Catholic client in a divorce action in all but two cases:

1. Where the client has the express purpose of re-marriage.
2. Where there are no statutory grounds for divorce and considerable perjury is indicated.

These would be cases involving two non-Catholics. In mixed marriages, even when the petitioner for the divorce is the non-Catholic, ecclesiastical permission must be sought.

While judges have to act according to statute, they, too, have many opportunities to aid in reconciliation. Would it not be possible for them to insist that reconciliation efforts be made before the case comes to trial? Should not their first concern be the marriage and the welfare of the children? And surely, they must

[4] Burke, Edward M., *The Legal Profession in regard to Separation and Divorce Cases,* p. 8.

rid divorce cases of fraudulent and perjured evidence. I dare say that evidence is admitted in divorce trials that never would be admitted in other cases. A judge can do much to direct a case. His attitude in divorce cases could do much to end hasty and ill-advised divorces.

And finally, lawyers can do much as legislators. Not all legislators are lawyers, but it is the lawyers who really write the laws in our legislative assemblies. Here is an enormous field for apostolic work. The divorce laws are chaos. The State is failing in its duty to its citizens. Divorce is destroying the fabric of society by destroying the family. The lives of innocent children are being wrecked. This is not a private matter. Therefore, the lawyer should work for a reform of procedure and laws in this matter. A uniform divorce law might be of great benefit. A law which is in effect in some places and has been considered in others, provides for a procedure to bring about a reconciliation before the case may be tried. The Interim Commission of the 1951 Legislature of Minnesota stated that, "Many marriages could be saved by an intelligent attempt at conciliation before, not after the parties start a divorce action."[5] The law might well provide for a special court or court aide to work out the problems of reconciliation. Some work has been done by bar associations in the various States, but much remains to be done to educate and persuade the legal profession to make these reforms. Here also there is a broad field for apostolic work.

Men skilled in the law must surely be able to see not only the problem but the solution. Christian men, and men devoted to the welfare of our Country, must act as far as they can to help not only the Church but society. In your work with your clients, and in the courts and in the legislatures you can be the leaven that will make our society good and productive again. The Catholic lawyer can do much to aid in reconciliation of spouses. He can safeguard the welfare of the family and of marriage by his advice and help. The members of the Guild of Catholic Lawyers can aid their bishops in this work of charity. Thus the Catholic lawyer will best uphold the law of the land, which he is sworn to defend and at

[5] *Report of Interim Commission on Domestic Relation Problems,* Minnesota Legislature of 1951, p. 9.

the same time express that virtue of love of neighbor which his faith demands.

Appended is the law which failed of passage in the Minnesota Legislature for various reasons, but which might well serve as a model for legislators.

Accordingly, attached hereto is a proposed bill for an act relating to the establishment of family courts; providing aid to such courts, and providing for a conciliation service in divorce and separate maintenance cases. We feel that this is one of the most important recommendations which the Commission is making. It is a radical departure from the present practice in this State. We sincerely believe it is highly desirable from the social point of view, and that it provides a way of saving many marriages which would otherwise be wrecked. The divorce rate has increased at an alarming pace over the last fifty years. A divorce means a broken home. It is believed that many marriages can be saved by an intelligent attempt at conciliation before, and not after, the parties start a divorce action, and before recriminations and accusations by the parties become part of the public records. To mention only one example, if the economic calamity which usually befalls a man and his wife—particularly where there are children—were pointed out to them, it might well cause them to hesitate.

This statute is implemented by the establishment of a family court and aid to the judges, as will be referred to later. The experience of judges, private agencies, and others justifies our belief that good results will come from this legislation.

The fact that there is some official person available to whom the parties must go before precipitantly starting a divorce action we believe is a sound social advancement. Private agencies, and even the Churches themselves, lack the power to make a person sit down and tell what his troubles are.

In the main, this legislation follows similar legislation in the States of California and Washington. In California it has been in existence for ten years. In Washington it is comparatively new, having been passed in 1949. In brief, it is required before starting a divorce or separate maintenance action (not annulment) for either or both husband and wife to file a petition invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation. The petition is captioned substantially as follows:

In the District Court of the State of Minnesota in and for the County of

_____

For the best interest and protection of
The Family of Mr. and Mrs. _____
Upon the petition of

_____

_____
(Petitioner)

And concerning

_____
(Respondent)

To the District Court:

A time and place shall be fixed for the hearing, and the court may cite respondent to appear, and may, if necessary, require the appearance of witnesses as in civil cases. The hearing shall be informal. By and with the consent of both parties the court may recommend and invoke the aid of outside persons or agencies. Provision is made for temporary relief pending the hearing.

The period during which no divorce action may be started cannot exceed 90 days after filing the petition, and it may be less. Action may be started at any time after the court determines that the parties cannot be reconciled and enters an order terminating the conciliation proceedings. The act applies to all married couples, those childless as well as those with children. No statement or admission by either party made in the course of conciliation conferences may be received in evidence at the trial, nor may either party plead a defense of condonation arising out of any act occurring during the pendency of the petition for conciliation under this act.

In implementing the conciliation proceedings proposed in this statute, other sections are provided which include the establishment of family courts in the large cities and, at the discretion of the District Court, in the county districts. Effective judicial treatment of cases involving the family relationship calls for courts equipped with the necessary facilities and qualified personnel. Such cases should be decided by judges having the required training and aptitude, and all of such cases should be assigned to them. This is especially important when the court undertakes, as proposed by this Commission, to bring about reconciliation between spouses between whom a serious difference has arisen. Since the prospects

of reconciliation are greatest when begun early in the dispute, the court should be on a local basis where it would be easily accessible to the parties, and where the judge and other personnel would be known by the parties to be available. A local tribunal will know local conditions and habits, which will contribute materially to the effectiveness of its work. Such specialized courts do not now exist in this State. In the three large cities juvenile cases are assigned to a particular District Judge, but divorce and other cases relating to the family are distributed among the remaining judges. For a time in Hennepin County, cases of default divorce involving children were, by order of the court, assigned to the judge having charge of the juvenile court. By this simple device the possibilities of an effective domestic relations or family court were demonstrated. But the inflexibility of present statutes does not permit the adjustment within the court needed for the equitable distribution of the work among the several judges, and this arrangement was discontinued.

Notes on the Constitutionality of This Legislation

We have some precedent for this type of legislation. In California they have had the act for ten years, and it has not been challenged from a constitutional standpoint. The public has a definite and important interest in domestic tranquility. Until recently, several States had either no grounds for divorce or very limited ones.

As a matter of principle, the State may introduce reasonable conditions into its legislation. The conditions here are entirely reasonable. Leave of court before bringing an action is known to all lawyers. Under this statute the court has only the power to make certain emergency orders pending the starting of an action. Due process is complied with, as nothing is done without all the basic principles of due process being guarded. The only possible exceptions might be some temporary orders during the pendency of the petition, and they are no different in substance from temporary *ex parte* orders in other proceedings.

A civil action, as defined in the statutes, is not necessary to put the judicial machinery into motion. Our constitution, Article I, Section 8, simply provides that every person is entitled to a remedy in the law, etc. It does not provide any particular form of action.

The statutes, Sections 540.01 and 543.01, provide that all civil actions shall proceed by the service of summons, etc. However, where jurisdiction over a certain subject matter is conferred upon a court, and no procedure is provided by the statute, the court may proceed under its general powers to adopt such procedure as is necessary to enable it to exercise and make effective the jurisdiction thus granted. See Section 90, *Dunnell's Minnesota Digest*, and particularly the cases cited under Note 97, which are: 99 Minn. 397; 110 Minn. 145; 152 Minn. 502; and 170 Minn. 49. It appears clearly from these decisions that the Legislature may impose proper judicial duties upon the court to be carried out in the form of some special proceedings, and in such cases there does not have to be an action pending in the sense that a summons and complaint must first be served. If the duties imposed upon the court are proper judicial duties, under our proposed statute the procedure is adequate for the situation. As heretofore stated, the basic principles of due process have been complied with, to-wit: notice, hearing, etc. It would seem to be perfectly clear that the proposed proceedings in the nature of conciliation between the parties in a divorce action are proper judicial functions to be imposed upon the District Court.

We believe our proposed legislation meets the objections found in People *ex rel* Bernat vs. Bicek, 91 Northeastern 2nd 588, Illinois, March, 1950. Whatever is done, the basic principles are guarded. The State does have an unusual and positive and substantial interest in the marriage status, and has a right to take such reasonable action as the situation seems to demand.

The bill provides that the courts shall delegate certain of their members to perform domestic relations work. Similar statutes with reference to Juvenile Court work have been in existence in this State for many years, and have never, so far as we can learn, been attacked from a constitutional standpoint. There is no reason to believe that our Minnesota Supreme Court would declare this act unconstitutional.

The Commission is proposing to abrogate in Minnesota the doctrine of recrimination, which is now the law here and in most States. That doctrine means: If one spouse has proven the other guilty of one of the statutory grounds for divorce, then as a defense the accused spouse may prove the accuser also guilty of one of the

statutory grounds. This results in neither being able to obtain a divorce. Whatever one may think of the philosophy behind this law, it is not a realistic approach to modern day domestic problems.

What is the practical operation of the present law? In many cases in which there would be a contest as to which is to get the divorce, fear that neither might get one persuades the parties to make collusive compromises, suppress the real grounds for a divorce, and sometimes permits the more guilty spouse to get the divorce. So we have about 90% of all divorces being obtained by default proceedings. The real cause of the trouble never comes to light and is not considered to be any concern of the court. We believe that a majority of the lawyers make a conscientious attempt to reconcile the parties before starting divorce proceedings. The result of their work is good. However, many of the default cases referred to have been the result of collusion and some of fraud. The judge under the law is usually required, after a few minutes of testimony, to grant the divorce. Too often the interests of the children are ignored by the parties and cannot be protected by the judge.

It is well to bear in mind that an innocent person could not be divorced unless he or she has grounds against the other and seeks a divorce.

This proposed legislation will not completely do away with the default divorces, but at least the law will not invite them. This proposal, coupled with the compulsory proceeding for conciliation, forms a well rounded, practical, and sound social approach to the problem of divorce.

Decrees and Decisions

CANONICAL

STUDY OF LATIN IN SEMINARIES

The Sacred Congregation for Seminaries and Universities on October 27, 1957, sent a letter to local ordinaries concerning the need for improvement in the study of the Latin language in seminaries. After deploring the serious deficiencies in this matter, the Sacred Congregation proposed certain remedies, among them the careful selection of qualified professors of Latin, the proper method of instruction, the authors studied, and the period of time devoted to this language.

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NEW INDULGENCES

The Sacred Penitentiary, Office of Indulgences, announced on different occasions that a partial indulgence of three years has been attached to each of the following new prayers:

(1) a prayer to be recited by members of the armed forces of the Republic of Argentina (January 27, 1958);

(2) a prayer to be recited by young women (March 7, 1958);

(3) a prayer to Saint Joseph the Worker (March 11, 1958); and

(4) a prayer to be recited by the faithful who are imprisoned (April 10, 1958).

All four prayers are the composition of Pope Pius XII.

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SHORT FORM FOR CONFIRMATION

In a private response to the Bishop of Norwich, given on April 10, 1958, the Holy Office indicated the brief formula to be used in case of necessity by priests who confirm those in danger of death. The following text of the response has been provided through the kind-

ness of the Most Reverend Bernard J. Flanagan, J.C.D., Bishop of Norwich, and of the Reverend Henry Dziadosz, J.C.L.:

"Huic Supremae S. Congregationi propositum fuit ab Excellentia Tua Rev.ma sequens DUBIUM:

"'Utrum in casu verae necessitatis in Confirmatione administranda a simplici Sacerdote iis qui ex gravi morbo in mortis periculo constituti sunt, licite et valide adhiberi possit formula brevissima:

"'N. Signo te signo Cru ✠ cis (quod dum dicit, imposita manu dextera super caput confirmandi, producit pollice signum crucis in fronte illius, deinde prosequitur) et confirmo te chrismate salutis. In Nomine Pa ✠ tris et Fi ✠ lii et Spiritus ✠ Sancti. Amen.'

"Ad praecedens Dubium Sanctum Officium respondet: AFFIRMATIVE."

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APOSTOLATE OF THE SEA

On June 6, 1958, the Sacred Consistorial Congregation issued a series of laws, established by authority of Pope Pius XII, to govern the *Opus Apostolatus Maris*. The laws, 32 in number, regulate the organization, its members and its chaplains, and certain faculties are given to the latter.

FREDERICK R. MCMANUS

CIVIL

CONTRACTS

As a general rule contracts are valid when the acceptance has been made. When the acceptance has been made by mail or by telegraph, the acceptance is valid when posted or given to the telegraph company. In Linn vs. Employers Reinsurance Corp. the acceptance was made by telephone, and the issue arose as to where the contract was accepted. The court held that the place where the acceptor spoke the words over the telephone was the place of acceptance, and hence the law of that place governed. The court recognized that this was against the view held in the Restatement of Contracts. Decided on March 17, 1958 by the Pennsylvania Supreme Court.

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TORTS OF CHARITIES

The Pennsylvania Supreme Court has held that the immunity of charitable institutions from tort liability is a question of public policy, and hence must be determined by the legislature. Although the policy of granting immunity was established by the courts, such an issue is so vested with the common good that the courts should not now disturb it. See Knecht vs. St. Mary's Hospital decided March 24, 1958.

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In Callopy vs. Newark Eye & Ear Infirmary decided on April 28, 1958 by the New Jersey Supreme Court, the immunity of non-profit eleemosynary hospitals from tort liability was abandoned as the law of the State of New Jersey. The court held that the policy of immunity was established by court precedent, and hence could be abolished by the courts. Hospitals no longer enjoy immunity from tort liability.

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In the case of Dalton vs. St. Luke's Catholic Church decided on April 28, 1958, the New Jersey Supreme Court ruled that even religious church property no longer enjoyed any immunity from tort liability. The court held that there was no sound basis for distinguishing the responsibility of religious societies from that of hospitals or other business corporations in regard to their torts.

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LOTTERIES

The definition of a lottery is defeated if their is some element of skill involved in the final outcome of the operation. The Arkansas constitution forbids lotteries, but this will not include pari-mutuel betting on greyhounds, as it does not include betting upon horse racing. The difference is to be found in the skill of knowing the various greyhounds in the race, and their comparative strength when pitted against each other. See Scott vs. Dunaway decided by the Arkansas Supreme Court on March 24, 1958.

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BLOOD TESTS

The United States Court of Military Appeals has held that a soldier has not been disobedient to a lawful command made by his superior officer in refusing to submit to a blood test on the charge of drunkeness. Such a command was certainly outside the scope of the authority of an officer of the military. U. S. vs. Musquire decided on March 28, 1958.

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DIVORCE CONFLICT

The state of domicile does not lose jurisdiction over the marriage of its subjects when they leave the state to avoid the law of the state. Two New Jersey citizens went to Indiana to avoid the law of New Jersey in regard to the legal age to enter marriage. The New Jersey Supreme Court ruled that New Jersey may annul the marriage for lack of proper age although the marriage was valid in Indiana. Wilkins vs. Zelichawski decided March 31, 1958.

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DEATH PENALTY

A Florida statute gives the jury the right to settle upon the death penalty for the crime of rape. In fact this penalty has been meted out only to negroes so convicted. The Fifth Circuit of Appeals has ruled that such a statute is constitutional since it leaves to the jury the burden of deciding the circumstances which would call for the death penalty, and is not discriminatory in its wording. Thomas vs. Culner decided March 2, 1958.

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CHARITABLE BEQUESTS

A bequest was left to a specific hospital which no longer functions as a hospital. The New York Surrogate Court for New York City has ruled that the bequest should be applied to some charity doing a like kind of work under the cy pres doctrine. The fact that a specific charity is mentioned does not make the bequest fall, unless the testator specifically provides this. Estate of Nettie Brown decided April 3, 1958.

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HUSBAND AND WIFE

The prohibition upon a wife suing her husband has been held to bar a tort action by a wife against her husband upon a cause of action that arose, and was filed as a law suit, before the marriage took place. The New Jersey Supreme Court would not distinguish the case. Koplich vs. C. P. Trucking Corp. decided May 5, 1958.

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INTEGRATION

The city of Greensboro, N. C. determined to sell its city swimming pools to private owners rather than to allow integration of the races while bathing. Upon petition to halt the sale, the District Court for North Carolina ruled that the city could not be prohibited from selling the pools in a bona fide sale. The court would keep jurisdiction of the case to ascertain that a bona fide sale took place. Tonkins vs. Greensboro decided May 23, 1958.

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CONSCIENTIOUS OBJECTORS

The University of Maryland requires Reserve Officers Training Course program for all of its students. Petitioner is a conscientious objector to service in the military, and held that this rule of University violated his freedom of religion under the first and fourteenth ammendments. The courts held that the University regulation was reasonable and did not violate the petitioners rights. Hanauer vs. Elkins decided June 3, 1958.

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ADOPTION

A Maryland statute provides for the appointment of a guardian for minor children whose parents are held unable or unfit to provide for them. This guardian has the power to give legal consent to the adoption of the children. The Maryland Court of Appeals has held that there is no violation of the first or fourteenth amendment in the appointment or powers of such guardians. The state has the power to provide for children in lieu of proper activity on the part of the parents. Winter vs. Baltimore Welfare Dept. decided June 20, 1958.

JOHN J. MCGRATH

Book Reviews

ROMAN FOUNDATIONS OF MODERN LAW. H. F. Jolowicz. At the Clarendon Press, Oxford, 1957. Pp. xx-217.

When Professor Jolowicz died in December, 1954, he had for many years collected material for a major work which was to present the main institutions and rules of Roman law in so far as they are the foundation of European law. In his well-known earlier book, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 1932; reprinted with corrections, 1939; second edition, 1952; reprinted with corrections, 1954), he had given us a treatise in the manner of the great German or Italian manuals on the constitutional, social, and legal developments of Rome from the early Republic to the Bas-Empire, intended to guide the beginner, and to assist the mature scholar, in the historical approach to the doctrines of the classical and of Justinian's law. But in his mind the investigation of the growth of the Roman legal system, from the archaic rules of the Twelve Tables to the accomplished structure of the *Corpus iuris*, had always been only one of the tasks the modern Romanist ought to set himself. Jolowicz's deepest concern was with the meaning of historical research for the lawyer of today, and, as the years went by, he became more and more convinced that in chiefly concentrating on the discovery of the "pure" pre-Justinian law, the Historical School was in danger of becoming an esoteric club of antiquarians. Too little interest was paid, he felt, to the living continuity of Roman law after its codification and to the many streams of European juristic tradition by which modern law is linked with the *Corpus iuris*.

From the notes he left, and which he probably meant to incorporate in a preface to be written for the volume under review, it appears that he planned (cf. Preface by the editor, p. iii),

> . . . with a minimum of legal history, to set out the outline of what appears in the Corpus Juris and then the highest common factor of the deductions which European lawyers have made from the text, together with some of the main variations. This will involve adverting at times to non-Roman elements which have taken the place of Roman ideas and institutions. This is especially true of the law of the family and in particular of marriage, where the chief common element has been not the Roman but the Canon law . . . ;
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> . . . to explain the Roman system in so far as it has become the basis of modern law, i.e., exclusive of matters of purely historical interest . . . , but inclusive of much theoretical and classificatory work done since Roman times . . . . Explain also how the modern teaching of Roman law from a purely historical point of view has militated against the understanding of Continental systems . . . .

In such an approach we are concerned, not with any formal validity, but with the Roman system as a formative element (p. 4). The manuscript as found at the author's death and faithfully edited by Professor F. H. Lawson of Oxford, represents only the first of several volumes in which this program was to be carried out. The book covers in three parts the sources of law, the law of persons, and family law; for a last chapter of part III, on guardianship, only an outline was left (cf. p. iv). In the chapter on "the divisions of the law" (pp. 61-81)—with its stimulating discussion of the impact which Gaius' apparently simple, and yet so puzzling, scheme of "persons, things, actions" exerted upon all later systematic arrangement, both of didactic books and codes—we may catch a glimpse of many of the other topics that subsequent volumes would have included.

This chapter may also serve as an example of the author's secure grasp and the range of his reading in the most widely differing legal systems and legal literatures. There are no generalizations and abstractions to blur the thorough examination of all the historical and juristic evidence. From the Glossators to Savigny and beyond; from the medieval treatises on *ordo iudiciorum* and actions to the modern discussions on the border line between substantive and procedural law; from the Decretals to the codifications of Civil law in our day, the traces left by the Roman conceptions are carefully worked out, as well as the modifications they underwent at the hands of the post-Roman jurists.

What is sketched in this chapter for the legal system as a whole, we find carried out in detail for the topics which form the subject of the completed parts, mentioned above. The results are of great interest, and especially so in those fields of law where medieval or modern modifications are considerable. Already in a paper he delivered, a year before his death, at a meeting of the Riccobono Seminar in Washington, on the " adventures " of some Roman law texts (*Seminar*, XII [1954], 34-50), Jolowicz had drawn attention to a tendency which has existed ever since the beginnings of medieval jurisprudence, viz., to use Roman texts out of context as " authorities " for legal rules that were unknown to the Romans; a tendency which to some extent found its model in the very habits of Justinian's compilers (e.g., in the title *De regulis iuris*). The Roman law of corporations, for instance, was a rather meagre affair, yet all the subtle doctrines on legal personality which medieval jurisprudence created were developed from a few scattered Roman texts. Or again, we know today that the canonical doctrine of the marriage contract is something quite different from the Roman " consensus, non concubitus facit nuptias "; and yet, who would deny that even by way of misunderstanding, this maxim had its share in the formation of the canonical concept?

At the outset of his book, the author states that " for our present purpose we have to start from the *Corpus Juris* as from something given " and that he is concerned with the history of the sources and the Roman rules before Justinian only in so far as they are preserved in his compilations. This was, indeed, his guiding principle, but wherever the problems at hand demanded it, he did not hesitate to go back behind Justinian's law and expound its classical antecedents. With all the difference of purpose, the author of the *Roman Foundations* did not set out to disavow his *Historical Introduction*. We must be grateful that we have his posthumous treatise, incomplete as it is; may it inspire new generations to carry on where Jolowicz laid down his pen.

STEPHAN KUTTNER

STIPULATION AND THE THEORY OF CONTRACT. Salvatore Riccobono. Translated from the Italian with Notes by J. Kerr Wylie. Revised and Edited with Further Notes and an Introduction by B. Beinart. A. A. Balkema, Amsterdam-Cape Town, 1957. Pp. xxiv-239.

In the course of his long career, Salvatore Riccobono (1864-1958), who occupies in many respects a unique place in modern Romanistic scholarship, published only few books, while the greater part of his learned output appeared in various professional journals in the form of major articles, often of monographic length. It was therefore an excellent idea of the late Professor J. Kerr Wylie of Cape Town to bring out in book form an English translation of one of Riccobono's outstanding studies in the law of contracts. This work, *Stipulatio ed instrumentum*, had first been published in the author's mother tongue in two installments, together of over two hundred pages, in the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung, XXXV (1913), 214-305; XLIII (1922), 262-397. Riccobono returned to the subject in some shorter articles and in 1935 reissued his study, with several additions and alterations, but still substantially the same, as litho-printed class notes for the use of his students under the title, *Corso di Diritto romano: Stipulationes, contractus, pacta.*

When Wylie died in 1948, he left a complete draft of his translation, based on the original version. His successor in the chair of Roman Law at Cape Town, Professor B. Beinart, undertook to revise the draft, incorporated the material from the *Corso* of 1935, and supplied additional annotations. To mark these off from Riccobono's own footnotes, the additional notes appear in square brackets and are severally signed *Tr.* (i.e., the translator, Wylie) or *Ed.* (i.e., Beinart). Some of them call attention to more recent bibliographical and other material which is relevant to Riccobono's topic, some are explanatory; and in some instances, the editor says, "I have the temerity to criticise, or disagree with, Professor Riccobono's arguments . . ." (p. x). Beinart also added at one point a lengthy digression of his own on the concept of *causa* in the Roman and the continental law of obligations; he rightly felt that the English speaking reader, unfamiliar with its technical use in the Civil law, might not easily understand in what *causa* differs from

the " consideration " of the Common law of contracts. Finally, in an introduction (pp. xvii-xxiv), the editor presented a fine essay on Riccobono's work as a Romanist scholar.

All parts of the work, which thus really has become a revised edition of the original, were submitted to Riccobono before publication, and he himself wrote a new preface for it (pp. vii-viii, signed November, 1954). Needless to say, his wholehearted approval of the translator's and the editor's work does not mean that he changed his views on those points where the editor registered his disagreement.

It is known that Riccobono's views on the Roman *stipulatio,* first proposed in 1913 and substantially unaltered in his later publications, have on the whole not convinced most of his fellow historians of Roman law. Briefly stated, he held that the degeneration in post-classical times of the once strictly oral and strictly formal contract of *stipulatio,* and its gradual replacement by the written document, led to the point where Justinian completely assimilated the oral and the written, the formal and the formless contract, with the result that in Justinian's compilations—by way of freely altering the classical texts through interpolations—every informal promise made for a *causa* became actionable. The presence of *stipulatio* in the *Corpus iuris* was therefore for Riccobono merely a theoretical and historical reminiscence, out of the Emperor's respect for what once had been the backbone of the Roman law of contracts. Against this theory, common opinion has held and still holds that the *nudum pactum* became enforceable only in the post-Roman development, especially under the influence of Canon law since the twelfth century.

Professor Beinart has earned our deep gratitude for having put within the reach of English speaking jurists a masterpiece of Continental, closely argued historical writing. Likewise, the reader will welcome the editor's thoughtful and very instructive annotations. The well-produced book testifies to the vitality of Roman legal studies in South Africa, where Dutch-Roman Law remains a living force. Regardless of the stand one may take for or against Riccobono's central thesis, this study of his remains of lasting interest. The new edition may also help to dispel the notion that Riccobono, because he often combatted certain trends in modern

interpolationist research, had no use for this important tool of textual criticism in disentangling the strata of Roman legal thought.

In the preface he wrote for the book in his ninety-first year, looking back on the work of his best years, Riccobono wrote: "As my thesis is based on interpolations introduced by Justinian in a rather imperfect and uneven manner into the old texts, I must concede some validity to the opposed doctrines . . ." (p. vii). Now that the old master is gone, these words have a particular moving ring, expressing his deep humility.

STEPHAN KUTTNER

Chronicle

Pope Pius XII had words of high praise for His Excellency Archbishop Amleto Cicognani, Apostolic Delegate in the United States, in a letter sent to him to commemorate the 25th anniversary of his consecration as a Bishop.

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Monsignor William J. McDonald was installed as Rector of The Catholic University of America in the presence of many of the hierarchy and distinguished leaders in the field of education.

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Monsignor Paul Leibold, Chancellor of the Archdiocese of Cincinnati, has been named Auxiliary Bishop to Archbishop Karl Alter of Cincinnati.

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More than 150 Cardinals, Archbishops, and Bishops bade farewell to His Eminence Cardinal Stritch as he sailed for Rome to take up his new duties as Pro-Prefect of the Sacred Congregation for the Propagation of the Faith.

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The Rev. Basil Frison, C.M.F., has been invited to Rome for work with the Sacred Congregation of Religious.

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Fr. Hesburgh, C.S.C., has been reappointed President of Notre Dame University.

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The School of Law at Loyola University, Chicago, marked its fiftieth anniversary on April 29.

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Bishop Ireton of Richmond died after a brief illness.

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The Rev. Gilbert Fini, C.P.S., an American, has been elected Superior General of the Stigmatine Fathers by a Chapter held in Rome.

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Monsignor (Maj-Gen.) Finnegan of the Air Force has been appointed Chief of Chaplains by President Eisenhower.

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The Very Rev. Francis Connell, C.SS.R. and Fr. Smith, O.P. are to receive honorary degrees from St. John's University, Brooklyn.

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Bishop Joseph Federal has been named Coadjutor to Bishop Hunt of Salt Lake City with the right of succession.

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Prayers throughout the world were offered for Cardinal Stritch who died in Rome on May 26.

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Dr. John F. Parr has been named Dean of the Foreign Service School at Georgetown University.

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At the Annual Meeting of the Eastern Conference of the Canon Law Society of America the following officers were elected: Mon. James Lowry of Scranton, President; Rev. Charles Connors of the Holy Ghost Fathers, Vice-president; and the Rev. James Searson of New York, Secretary-treasurer.

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The Rev. Clement Neubauer, O.F.M.Cap., of Milwaukee, Wisconsin, has been re-elected as Minister General of the Capuchin Fathers.

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The Rt. Rev. George J. Casey, P.A. has been appointed Administrator of the Archdiocese of Chicago.

ROMAEUS W. O'BRIEN, O.Carm.

THE CATHOLIC UNIVERSITY OF AMERICA
WASHINGTON, D. C.

✠

VENERANDAE MEMORIAE

PII $\overline{PP}$ $X\overline{II}$

SVMMI SACERDOTIS

QVI CHRISTI VICES IN TERRIS

PLVS QVAM XIX ANNIS GEREBAT

QVEM DIE $\overline{IX}$ OCTOBRIS • ANNO MCMLVI$\overline{II}$

AETATIS SVAE LXXXI$\overline{II}$

DOMINVS IN SANCTORVM SVORVM PONTIFICVM

CONSORTIVM AETERNVM REVOCAVIT.

R. I. P.